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In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1956

Nos. ~~9, 3-996~~ 122 - 125

THE IVANHOE IRRIGATION DISTRICT,
vs. *Plaintiff and Appellant,*
ALL PARTIES AND PERSONS, etc.,
Defendants,
THE STATE OF CALIFORNIA,
Defendant and Appellant,
COURTNEY MCCRACKEN,
Defendant and Appellee.

No. _____

THE MADERA IRRIGATION DISTRICT,
vs. *Plaintiff and Appellant,*
ALL PERSONS, etc.,
Defendants,
THE STATE OF CALIFORNIA,
Defendant and Appellant,
CARL F. STEINER, et al.,
Defendants and Appellees.

No. _____

PHILLIP and JANE E. ALBONICO,
vs. *Plaintiffs and Appellees,*
THE MADERA IRRIGATION DISTRICT,
Defendant and Appellant,

No. _____

THE SANTA BARBARA COUNTY WATER AGENCY,
vs. *Plaintiff and Appellant,*
ALL PARTIES AND PERSONS, etc.,
Defendants,
MAURICE A. BALAAM, et al.,
Defendants and Appellees.

No. _____

On Appeal from the Supreme Court of California.

APPENDICES TO JURISDICTIONAL STATEMENT.

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(Vol. 47 A.C. 603, 306 P. 2d 824.)

[L. A. No. 23043. In Bank. Jan. 24, 1957.]

THE IVANHOE IRRIGATION DISTRICT, Plaintiff and Appellant, v. ALL PARTIES AND PERSONS, etc., Defendants; COURTNEY McCRACKEN et al., Respondents; THE PEOPLE, Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Tulare County. Benjamin C. Jones, Judge.* Affirmed.

Proceeding by an irrigation district to obtain confirmation of a contract entered into by it with the United States, by which the United States undertook to deliver water from the Central Valley project to the district and to expend funds for the construction of a distribution system within the district. Judgment for objecting defendants, affirmed.

SHENK, J.—The plaintiff Ivanhoe Irrigation District and certain of the defendants appeal from a judgment refusing to confirm a proposed contract between the United States, [611]** acting by and through the Bureau of Reclamation of the Department of the Interior, and the district. The contract provides for the delivery of a supply of water for irrigation purposes from the Central Valley Project and for the construction of a distribution system to make the water available for beneficial use on the lands within the district.

*Assigned by Chairman of Judicial Council.

**Figures in [ ] refer to the pages of 47 Advance Cal.

On September 23, 1949, the plaintiff district, purporting to act under the Irrigation District Federal Cooperation Law (Wat. Code § 23175 et seq.), entered into the contract with the United States. As required by law the contract was approved by the California Districts Securities Commission, but with reservations (Wat. Code, §§ 23222 and 24253), and by the district's electors (Wat. Code, §§ 23220 et seq).

This proceeding was commenced by the district on October 31, 1949, in the Superior Court in and for the County of Tulare to have the contract confirmed. Confirmation is required by federal law (Omnibus Adjustment Act of 1926, § 46, 44 Stats. 649, 650, 43 U.S.C. § 423e (1946), Federal Reclamation Laws, Ann. 318-319), by section 42 of the contract and by the Water Code of the State of California (§ 22670 et eq., § 23225). It is a special proceeding in rem, and summons was by publication. It was brought against all persons having or claiming to have an interest in the formation of the plaintiff district and in the operation of the proposed contract and the lands affected thereby. It will fix the status of all property within the district lawfully affected by the contract and a final judgment will foreclose further inquiry into the matters to which the judgment properly relates. Within its pertinent issues it will be binding on the world at large. (Code Civ. Proc., § 1908; *Becher v. Contoure Laboratories*, 279 U.S. 388 [49 S.Ct. 356, 73 L.Ed. 752]; *Riley v. New York Trust Co.*, 315 U.S. 343 [62 S.Ct. 608, 86 L.Ed. 885]; see *Frenchman-Cambridge Irr. Dist. v. Ferguson*, 154 Neb. 20 [46 N.W.2d 692].) The judgment is limited to a determination of the validity of the contract. As necessarily incident

thereto questions relating to the title to and the control to be exercised over the unappropriated domestic waters of the state, to the distribution and sale of those waters by the district and to the ownership of the distributing system to be acquired by the district, will be considered.

Originally only two parties appeared as parties defendant, the first being the People of the State of California, acting by and through the attorney general. The other appearing defendant is Courtney McCracken, the owner of 309 acres of irrigable land within the district. He filed a demurrer [612] on December 13, 1949, and an answer on November 11, 1950. He is a bachelor and those provisions of the contract (§§ 34, 35 and 36) which would limit to a single person the ownership of no more than 160 acres of land entitled to the distribution of water, particularly are sought to be applied to him. He is a nonresident of the district and could not, under terms of the applicable law (Wat. Code, § 23220 et seq.) vote for or against approval of the contract. He opposes confirmation for numerous reasons but particularly on the ground that the 160-acre limitation hereinafter considered is not applicable and is invalid as to him and his property within the district.

A default was entered against everyone not appearing within the time specified in the published notice of service. The United States did not formally appear but caused the Regional Counsel and Assistant Regional Counsel of the Bureau of Reclamation of the Department of the Interior to request permission to appear as amici curiae. Objection to such an appearance was interposed by the then attorney general on the ground that the United States

was a party interested in the proceeding and should appear as such. The objection was overruled and the request granted. Federal counsel thus appeared and took part in the proceedings throughout the trial.

The State Engineer is Chief of the Division of Water Resources of the Department of Public Works and pursuant to law has exercised the duties imposed upon the Water Commission.[1] He did not appear prior to argument in the trial court, but at that time the court, on its own motion, set aside the default of the State Engineer and he appeared and filed an answer by his own counsel as he had the right to do. (Gov. Code, §§ 11040, 11041.) He stated that his interest in the proceeding was to protect the state water law from impairment, and that in the event the court saw fit to validate the contract he requested the court to confirm what he claimed to be established state law relating to the title of the state's water resources and regulations pertaining thereto. The particular relief which he seeks will be hereinafter noted.

Counsel for the Di Giorgio Fruit Corporation, the owner of large areas of irrigated and irrigable lands in the San Joaquin Valley in and out of the district, appeared as amici [613] curiae and participated in the trial in opposition to confirmation of the contract.

The petition sets forth the essential facts as a basis for the request for confirmation. The prayer is that the court examine and enquire into the proceedings for the organiza-

[1]Under the provisions of A.B. 4, ch. 52, 1956 First Extra Sess., effective July 5, 1956, these duties, with the exception of supervision of water distribution, were transferred to the new State Water Rights Board, and the new Director of the Department of Water Resources assumed the functions of the Water Resources Board.

tion of the district and the validity of the contract, and that a judgment be entered confirming those proceedings and the contract. A copy of the proposed contract is attached to the petition and made a part thereof.

On December 13, 1949, the attorney general filed a general and special demurrer on behalf of the state in which he attacked the validity of the contract sought to be confirmed. Before the demurrer was ruled upon and on November 8, 1950, he filed an answer reiterating as defensive matter the position taken in the demurrer, which was (1) that the proposed contract would be an unconstitutional delegation of the legislative power of California to Congress, to the Secretary of the Interior, and to the district, acting jointly; (2) that certain land limitation provisions of the Reclamation Laws which the contract purports to apply within the district are not applicable to the land within the district; (3) that the contract unconstitutionally deprives owners of excess land of property without due process of law; (4) that the Irrigation District Federal Cooperation Law of the State of California, under which the district purports to proceed, violates the Constitution and laws of the State of California requiring uniform operation of general laws and prohibiting special laws where general laws may be applicable, and (5) that the contract is not authorized by federal law.

The prayer of the state was that a judgment be entered that the plaintiff take nothing by the petition; that a declaration be made of the rights and duties among themselves of the State of California, the United States, the plaintiff District and the landowners therein with respect to the contract, and for all other proper relief.

On March 7, 1951, in open court, the attorney general sought leave to withdraw the original answer of the State of California and to file an amended answer. Permission was granted and the amended answer was filed on March 30, 1951, seeking the confirmation of the contract.

The filing of the amended answer occurred after conferences and correspondence between the state's representatives and the Secretary of the Interior. In his letter of March 5, 1951, the Secretary of the Interior stated that questions "with respect to the historical, present and future ownership of [614] water or water rights" would seem "to be immaterial to the question whether a particular contract for water service or for the construction of a distribution system, or both, is a valid one and to the question of the authority of the district to enter into it"; that he did not believe "that a finding that the contractual obligations are valid is determinative of the title of the water", and that the question "whether an individual water user, or a district may have a legal right to demand the continual delivery of project water after the expiration of the 40 year term of a water service clearly is not affected by a finding that the contract of itself is binding during its own express term."

In response to the letter of March 5, 1951, the attorney general replied, under date of March 22, 1951, that "It is my view that this contract is not intended to and does not deal with, determine, or settle any questions with respect to the historical, present or future claims of ownership of water or water rights that are now or may hereafter be urged by the United States, the State of California, the Ivanhoe Irrigation District, or individual or cor-

porate landowners or users of the water, the furnishing of which is provided for by the said contract."

To the letter of March 22, 1951, the Secretary of the Interior replied under date of March 27, 1951, in which he agreed with the attorney general that the ownership of water or water rights would not be affected by the contract or by the validation proceedings. He concluded that it would follow that water will be supplied pursuant to appropriations filed by the United States, appropriations filed by the state and assigned to the United States, and rights acquired by contract and otherwise from private individuals and corporations; that as to such water, the United States will contract only to furnish a supply and to be paid for services rendered; that the contracts will not and will not purport to affect the ownership of the water or rights thereto, and that the ownership of water or water rights by a water district or a landowner therein will be no different than had the supply been furnished by the Water Project Authority of the state.

Notwithstanding the foregoing the allegations of paragraphs VI and VIII of the original answer on behalf of the state and the same numbered paragraphs of the amended answer in effect remained the same. Paragraph VI of the amended answer alleges that the State of California, acting through its Department of Finance, pursuant to state law, previously filed with the Division of Water Resources of the Department [615] of Public Works of California certain applications for the appropriation of the unappropriated waters of the Sacramento and San Joaquin Rivers and their tributaries for the use and benefit of the Central Valley Project and the owners of

lands to be irrigated therefrom; that by assignments, made pursuant to statute, the State of California, again acting through its Department of Finance, assigned to the United States for the use and benefit of the Central Valley Project certain of these applications.

Paragraph VIII of the state's amended answer alleges that by virtue of the terms of the applications, the state has become and is the trustor of an express trust; that by the assignments the United States has become and is the trustee of that trust; that the landowners to be served from the works of the Central Valley Project, including the landowners of plaintiff district, have become and are the beneficiaries of that trust; that any and all claims or interests of the United States obtained by the proposed contract are held by the United States as such trustee as a part of a trust corpus or res for the use and benefit of the Central Valley Project and the landowners to be served water from the works of that project, and in particular the landowners of plaintiff District, that the State of California is entitled to be heard, among other things, as to all matters relating to the administration and execution of the trust by the United States and is entitled to require that the trustee administer the trust according to its true intent and meaning.

However in apparent furtherance of the understanding between the attorney general and the Secretary of the Interior it was alleged in paragraph XI of the amended answer that the validity of the contract "does not depend on whether the United States has rights to the water to be delivered by it pursuant to the contract or rights to the use thereof or title or ownership thereto; . . . that an

adjudication of such rights to water or the use thereof or title or ownership thereto is not appropriate in this proceeding, and that such an adjudication herein would be contrary to the best interests of the State and of the United States." Copies of correspondence between the Secretary of the Interior and the attorney general, including the letters above referred to, were attached as exhibits to the amended answer.

The prayer of the amended answer is "(1) that the district's legal capacity and authority to enter into the contract, the proceedings on the part of the district for the authorization of the execution of the contract, and the execution of [616] the contract between the Ivanhoe Irrigation District and the United States be confirmed and declared valid; and (2) that the decree in this proceeding recite that on the issues properly raised in this proceeding the decree is not required to and does not purport to be an adjudication of the right or interest of the State of California or of its agencies, including but not limited to the Ivanhoe Irrigation District and the Water Project Authority, or of the right or interest of the United States or its agencies, or all or any of the above, in or to the waters or water rights or respecting the regulation of the use thereof under the laws of the State of California, involved in the Central Valley Project.

"And Wherefore, the Water Project Authority which is not taking any position on the validity of the contract between the Ivanhoe Irrigation District and the United States, prays that the decree in this proceeding recite that on the issues properly raised in this proceeding the decree is not required to and does not purport to be an adjudica-

tion of the right or interest of the State of California or of its agencies including but not limited to the Ivanhoe Irrigation District and the Water Project Authority, or of the right or interest of the United States or its agencies, or any or all of the above, in or to the waters or water rights or respecting the regulation of the use thereof under the laws of the State of California, involved in the Central Valley Project."

On the day set for hearing, March 7, 1951, the court suggested that the district might be infringing upon the powers of the Water Project Authority of the State of California, and that the Authority might well be an active, indispensable party to the proceedings. Accordingly, the court set aside the default of the Authority and permitted it to file an answer. The Authority appeared through the attorney general, whose joint answer served as the amended answer for the State of California, heretofore set out in part, and the answer of the Authority. The latter assumed a neutral attitude so far as the validity of the contract was concerned, and prayed that a decree issue declaring the rights of the parties but not purporting to adjudicate the right or interest in or to water or water rights or respecting the regulation or use thereof under the laws of the state. The principal attorney for the Division of Water Resources of the Department of Public Works appeared as amicus curiae on behalf of the Water Project Authority.

The trial of the case insofar as the taking of evidence was concerned took place on April 3, 1951. The record consists of [617] documentary evidence and other matters of which the court may take judicial notice. There are no

disputed questions of fact. Briefing in the trial court was extensive and oral argument was not presented until more than a year later. The findings of fact and conclusions of law were signed and judgment was entered on February 27, 1953, denying confirmation of the contract on numerous grounds. Under the statute if the contract fails of confirmation on one material ground it must fail of confirmation as a whole. (See Wat. Code, § 22680.) However, as the trial court refused confirmation on many grounds, more than one must be ruled upon for the guidance of the trial court in possible further proceedings. The judgment contained injunctive orders prohibiting the district from refusing or failing to supply to the defendant Courtney McCracken water for irrigating purposes for all of his lands within the district and in general from proceeding under the contract. Since the judgment declaring the invalidity of the contract must be affirmed, the injunctive provisions may be disregarded. Neither those provisions nor anything herein should be taken as prohibiting the contracting parties from renegotiating a new contract or from continuing the distribution of water pending such negotiations.

Notices of appeal were filed on March 16, 1953, by the plaintiff Ivanhoe Irrigation District, and on March 17 by the People of the State of California and the Water Project Authority of the State of California. The district and the state have filed joint briefs. Reply briefs have been filed by the defendant Courtney McCracken supporting the judgment and the State Engineer who seeks a judicial declaration of the nature of appropriative water rights under the state law, the legal status of the state

in relation to water subject to appropriation, the status of the United States as trustee for the benefit of the project water users, and the interpretation of certain provisions of the federal Reclamation Project Acts of 1902 and 1939 hereinafter referred to. Amici curiae briefs in support of the judgment have been filed by the California Farm Bureau Federation and the Di Giorgio Fruit Corporation. An amicus curiae brief has been filed by the Ventura County Flood Control District, which does not attack the judgment as to the invalidity of the contract but contends that the court's conclusion of law to the effect that the water rights involved are appurtenant to the lands upon which the water is now used or is to be used, is not in accordance with existing law. The federal government is not a party to the appeal but it is apparent [618] that its attitude is reflected in the position of the attorney general, particularly with reference to the 160-acre limitation hereafter discussed. There is no disagreement on the part of any party appearing as to the correctness of the judgment of the trial court that the title to and control over the unappropriated domestic waters of the state are vested in the state in trust for the water users of the state.

The questions raised in this case cannot be answered without reference to the nature and character of the title to the water rights involved. Closely related thereto and in part determinative thereof are the efforts put forth by the state in aid of the development of its water resources for the benefit of the people of the state, which efforts finally resulted in part in the Central Valley Project. From the beginning it was realized that the growth and development of the state, from the standpoint of agricul-

ture, industry, population and general welfare, required sources of water supply in addition to the annual rainfall and underground supplies. This was especially true in the vast arid or semi-arid sections of the state, including the great central valleys of the Sacramento and San Joaquin Rivers.

Authorization to inquire into the problem was provided for as early as 1850. (Stats. 1850, p. 256.) These efforts were repeated in 1878 (Stats. 1878, p. 634), in 1911 (Stats. 1911, p. 822), in 1913 by the adoption of the Water Commission Act (Stats. 1913, p. 1012), and in 1915 (Stats. 1915, p. 514). In 1921 a state-wide conservation plan study was authorized (Stats. 1921, p. 1685) and reports thereon were made to the Legislature in 1923 in Public Works Bulletins Numbers 4, 5 and 6. In 1923 the Legislature failed to furnish funds for further studies and money was provided by the Chambers of Commerce of Los Angeles and San Francisco for that purpose. A further report was made in 1925 in Public Works Bulletin Number 9. This report emphasized the needed coordinated development in the Sacramento and San Joaquin Valleys. In 1925 the Legislature provided for further studies and reports (Stats. 1925, p. 1013) which were made to the Legislature in 1927 by Public Works Bulletins Numbers 12, 13, 14, 15 and 16. These reports also emphasized the needed coordinated development in the Sacramento and San Joaquin valleys. Following these reports the Legislature in 1927 (Stats. 1927, p. 508) deemed it advisable to provide for the appropriation within the provisions of the then Water Commission Act of all of the unappropriated waters of the various streams of the state which might be needed for

the coordinated plan of [619] conservation in the central valleys. It was under this authorization that the Director of Finance, beginning in 1927, filed some 37 applications on behalf of the state on streams within the central valley area, some of which were intended for the storage of water in the Friant Reservoir of the San Joaquin River and the construction of the proposed main canal southerly therefrom through the area of plaintiff district. Several of these filings cover water which is essential to the Central Valley Project.

As the result of the prolonged studies and planning by the state, the Legislature in 1933 enacted a statute designating the Sacramento-San Joaquin coordinated project as the Central Valley Project, and created the Water Project Authority as an agency of the state to construct, operate and cover the cost of the project, estimated at $170,000,000. (Stats. 1933, p. 2643.) The units and works to constitute the Project were defined in the statute. They included, among other works, Friant Dam and the Friant-Kern Canal to conduct water to and through the Ivanhoe area. That act is now contained in sections 11100-11830 of the Water Code.[2]

The Central Valley Project Act authorized the issuance and sale of $170,000,000 in revenue bonds. But in those days of depression and unemployment, such bonds were of doubtful or uncertain financial favor so far as the investing public was concerned. At any rate they were not sold

[2]An overall state water plan, entitled "The California Water Plan," was undertaken by the Director of Water Resources and a preliminary report was issued entitled "Report on the California Water Plan, Preliminary Edition," State Water Resources Board, Bull. No. 3, May, 1956."

and the state turned to the federal government for financial assistance. The problem then confronting the state was simply one of *money*. It is an undeniable fact that the State of California, without federal or other outside assistance, could have followed through with its plans for the development of the Central Valley Project if it had had the money with which to do it. The state was well equipped with an engineering staff and other expert assistance in its Department of Public Works, Division of Natural Resources, to construct and operate necessary works and facilities to do all that has been done by the United States. All that was needed was the money available through state channels and expendable under the authority of the state alone. The Legislature contemplated and required that the Water Project Authority "proceed with the construction of the project immediately upon [620] funds being available therefor" (Wat. Code, § 11452) and that the Authority have "full charge and control of the construction, operation, and maintenance of the Project and the collection of all rates, charges and revenues from it" (Wat. Code, §11451).

The studies of California water problems by the Board of Public Works through the State Engineer pursuant to legislative authority beginning in 1921 and extending over a ten-year period at state expense were far reaching. They have been characterized as "the most comprehensive and thorough going set of studies instituted by a state agency looking to the development of its natural resources." (History of Legislation and Policy Formation of the Central Valley Project, U. S. Dept. of Agriculture, Bureau of Agricultural Economics [1946].) The report based on

these studies (Public Works Bulletin 25, Report to Legislature of 1931 on State Water Plan) was officially approved by the Legislature in 1941. (Stats. 1941, p. 2943, Wat. Code, § 10001.) Admittedly the Central Valley Project is not the result of the planning, ingenuity and energy of the Bureau of Reclamation, but it is recognized by the Bureau and the Department of Interior to be the creature of the state. This is shown by the testimony of the Commissioner of Reclamation in relation to the Department's 1948 Appropriation Bill as follows: "The history of [the Central Valley Project] is also necessary to understand this project. This project has been a dream of over half a century in California. The Bureau of Reclamation did not start this project. It has been made the agent for completing it." (Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, Eightieth Congress, First Session on the Interior Department Appropriation Bill for 1948, p. 723.)

Faced with lack of state funds sufficient to finance such an extensive enterprise application was made to the United States for loans or grants of federal funds sufficient to construct initial units of the project. The loans sought were to be secured by the revenue bonds of the Project Authority authorized by the Central Valley Project Act. Although the engineering feasibility and the need for the project were recognized by the Financial Division of the Public Works Administration, and several other federal agencies reported favorably on the project, the economic soundness of the project was questioned and efforts along these lines were terminated. However, in 1935 the project was referred to the Bureau of Reclamation of the De-

partment [621] of the Interior for study. In the report of the Secretary of the Interior to the President on the 26th of November, 1935 (Booklet of Information for Conferences Between U. S. Dept. of the Interior and Water Project Authority of the State of California [Aug. 28, 1940], p. 16), on the feasibility of the project it is stated: "The next declaration required is that the cost of construction will probably be returned to the Federal Government. This is interpreted to mean that it will be returned within forty years from the time the Secretary issues public notice that water is available from the Project works. The estimated cost of construction is $170,000,000.00 and the annual cost, including repayment of all other charges, is $7,500,000.00. It is estimated that the annual revenues from the sale of water and of electric power will be sufficient to cover these charges. The favorable conditions heretofore recited justify the belief that the project will return its cost." Relying on this report the President gave his approval to the proposed plan as a federal reclamation project. (Booklet of Information, *supra*, p. 15.) The President, on recommendation of the Secretary of the Interior, allocated $20,000,000, later reduced to $4,200,000 under the Emergency Relief Appropriation Act of 1935, to initiate construction of the project. In that same year, with the passage of the Rivers and Harbors Act on August 30, 1935, a direct contribution of $12,000,000 from federal funds was authorized for the construction of Kennett (now Shasta) Dam. (U. S. Stats., 49 Stats., p. 1038.) Thereafter Congress regularly made funds available to the Bureau of Reclamation for the construction of the project, and prior to August 31, 1951,

a total of $396,937,427 had been appropriated. The Bureau of Reclamation established an office in Sacramento and commenced work on the project in 1935. Work on the project units including the plaintiff district's unit has been continuously prosecuted. It is to be noted that the allocations of funds by the federal government were generally made with a proviso that such funds were reimbursable in accordance with the reclamation laws. (See First Deficiency Appropriation Act of 1936, June 22, 1936; Booklet of Information, *supra*, pp. 23, 24, 25, 30, 31.)

There can be no question but that the Federal Bureau of Reclamation and not the Water Project Authority of the state has constructed those units of the Central Valley Project heretofore completed. But it appears from the foregoing and the following that the parties contemplated a state project to be eventually owned and operated by the state. [622] The Water Project Authority, at the request of the bureau, was in close cooperation with the bureau throughout. On March 25, 1936, a cooperative contract was executed between the United States and the Water Project Authority. This was followed by four additional supplemental contracts on March 13, 1937, November 8, 1937, January 17, 1939, and June 30, 1939. These contracts and others executed by the state's Department of Public Works provided, among other things, for the performance of certain tasks by the state agencies and approval of the Bureau's planning by the Authority. The first cooperative contract with the Authority contained a special provision as follows: "It is contemplated that at the earliest practicable date a contract will be entered into between the United States and the Water

Project Authority, providing for, but not limited to: (a) The operation and maintenance by the authority of useful units of the project, upon presenting assurance of payment satisfactory to the United States of the cost thereof. (b) Appropriate payment by the authority to the United States for expenditures in construction of the project." In the second and third supplemental contracts the special provision was restated in about the same terms. On February 15, 1939, the governor of the state addressed a letter to the Secretary of the Interior in which he suggested that a contract be entered into immediately providing for the administration, operation and maintenance of the project by the Authority, and for the repayment of the reimbursable costs of the project by the Authority to the United States. In answer thereto the Secretary of the Interior suggested procedures by which state agencies might take over certain facilities. No definite developments resulted along this line.

The United States has acquired in its own name rights to certain domestic waters of the state. These rights are to waters which are essential to the success of the Central Valley Project. No claim is made that such water has been acquired for any purpose other than for the use and benefiit of the project. The nature of the interest or title which the United States has acquired is hereinafter referred to. The United States owns no lands in the Central Valley, and by express provision the acquisition of water rights in most instances was for the benefit of the Central Valley Project or units thereof. The greater portion of water to which the United States has acquired rights is by assignments from the state's Director of Fi-

nance. (Wat. Code, § 10500 through 10506.) Four assignments of applications for the appropriation of [623] unappropriated water of the Sacramento River, totaling 35,000 second feet diversion and 12,690,000 acre-feet annual storage, were made on September 3, 1938. On September 30, 1939, three assignments of applications for the appropriation of unappropriated water of the San Joaquin River, totaling 9,500 second-feet diversion and 4,420,000 acre-feet annual storage, were made to the United States. Requests for additional assignments have been made to the Director of Finance by the United States. The assignments made were in trust for the use and benefit of the Central Valley Project and with the necessary reservation that the landowners and inhabitants within a watershed area or other area conveniently supplied by the watershed area are not to be deprived of their prior rights to water reasonably required for their beneficial needs. (Wat. Code, § 11460 and 11463; see Wat. Code, § 11128, as added in 1951 [Stats. 1951, p. 3216].)

The United States itself, between 1943 and 1952, as original applicant, filed eight applications for the appropriation of unappropriated water totaling 33,810 second-feet diversion and 2,646,000 acre-feet annual storage of domestic waters of the state. In all instances these applications were made for specific purposes in connection with the Central Valley Project.

The United States has also acquired through contract extensive riparian, appropriative and prescriptive water rights in the San Joaquin River once held by Miller and Lux, Inc. Water rights in the area involved have been the subject of considerable litigation. (See *United States v.*

Gerlach Live Stock Co., 339 U.S. 725 [70 S.Ct. 955, 94 L.Ed. 1231]; *Everett G. Rank v. Krug, U. S. Dist. Ct., Southern Dist. of California, Northern Div. No. 685 N.D.*, 142 F.Supp. 1; *Hollister Land & Cattle Co. v. Krug, U. S. Dist. Court, Southern District of California, Northern Division, No. 680-N.D.*, [*Rank v. Krug*, 90 F.Supp. 773, 806].) It is asserted that the United States intends to divert some of this water to the Central Valley Project. By agreement dated May 24, 1939, between the United States and the Madera Irrigation District, the United States acquired assignments of all of the District's applications to appropriate the water of the San Joaquin River, grants of the Friant Dam site, portions of the reservoir area and certain gravel deposits. In addition to the foregoing, the United States has acquired, or is in the process of acquiring, the riparian, appropriative and prescriptive water rights of hundreds of smaller landowners, all of whom are affected by [624] the construction of units and the diversion of water for the Central Valley Project.

In view of the foregoing circumstances the trial court properly refused to eliminate the issue of title from the case. It is obvious that the attorney general of the state and the Secretary of the Interior could not, by agreement, exclude from the proceeding the question of title or ownership of water or foreclose other interested parties from pressing it as a vital question in the case. There is no dispute between any of the parties appearing in the litigation as to the nature of that title and it is of great importance for upon it depends the extent to which the state or the United States or any party dealing with

the domestic waters of the state may exercise powers of control.

If the United States, or the State of California or any of its agencies, should be declared to be the owner of the title to the water without restriction it would necessarily follow that it would have complete dominion and control over such property for purposes of distribution or for any other incident of ownership and use. In such case the principles of law applying to unrestricted ownership would control. On the other hand if the United States or the State of California or its agencies, in dealing with the storage, sale, distribution and use of such water, is acting as trustee for the beneficiaries of the trust, other principles of law, namely the law of trusts, would necessarily apply. The exclusion of the question of title from the case could be justified only on the theory that without question, and as a matter of law, the fee simple unrestricted title to the water is in the state or in its assignee, the United States, or in the United States other than by assignment unaffected by the claims of the landowners in the District as to beneficiaries of a trust. Such a theory finds no support in the present case.

A trust relationship has existed at all times here involved, and now exists, between the State of California and the water users of the state, including the water users of the plaintiff district, as to all waters the control of which has been acquired by the state by appropriation or purchase. As stated it is asserted by appropriate allegations in the pleadings of all of the parties formally appearing as parties defendant, including the State of California, and the existence of such a trust relationship

is not denied by the plaintiff district or by any party appearing in the proceeding. It is only because of the position alleged to be asserted by the United States that it is vested with absolute ownership in and to the [625] water to be distributed to the lands in the district, and to the property of the district used and usable in the distribution of water to lands therein, that the question of title has arisen. The question is also important as bearing on the contention of the landowners in the district that the contract would deprive them of vested rights without due process of law and without just or any compensation.

In considering the question of the title of the United States and of the State of California in and to the domestic water of the state and the corresponding limited measure of control which they may exercise over them, it is well to consider certain historical phases of the water law of this state. And this may be better understood by considering the attitude assumed by some of the water users of the state in their contentions for many years that they had absolute and unrestricted title and dominion over the waters riparian to their lands to the exclusion of the rights of the state in administering the trust imposed upon it by the water law of the state for the benefit of other water users.

In the early history of California the waters of the rivers and streams of the state, especially in the northern section were used for placer and hydraulic mining, the raising of livestock, domestic and kindred purposes. It was early realized that water in this semiarid region was of utmost importance to the welfare, progress and prosperity of the people of the state. There were few court

decisions on the subject having a statewide significance prior to the case of *Lux v. Haggin* in 1886 (69 Cal. 255, 454 [4 P. 919, 10 P. 674]). At that time section 4468 of the Political Code provided as follows: "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all the courts of this state." This court took the general language of that declaration by its four corners and applied the English common-law doctrine of riparian rights to the ownership, control and use of the waters of the rivers and streams of the state. The doctrine was declared to be that the owner of real property bordering such a river or stream had a right coexistent with the same rights of other landowners on the stream, to the use of its waters and the flow thereof as it was "wont to do in the course of nature" unimpaired in quality and undiminished in quantity. This right was declared by this court in *Lux v. Haggin, supra,* 69 Cal. 255, to be a right appurtenant to the land, in fact a part and parcel of the land itself. Under this doctrine [626] the riparian owner had the right to insist that the full flow of the stream continue to pass by his land in its natural state whether he needed the water or not. This riparian right as so defined was declared by this court to be a property right which vested in the riparian owner and as such was protected by the state and federal Constitutions. It could not be limited or impaired without due process of law and without just compensation. The enforcement of that right as so defined led to the adoption of the Water Commission Act of 1913. (Stats. 1913, p. 1012.)

By the provisions of that act it was sought, among other objectives, to subject the enjoyment of the riparian right to the rule of reasonable beneficial use. Accordingly it was provided in that act that the use of the waters of the rivers and streams of the state on the part of the riparian owners be limited to the water they could reasonably use for beneficial purposes and that whatever water remained in the stream flow would be subject to reasonable use through appropriation or other methods provided by law. The substance of what the Legislature was endeavoring to do was to provide, in the exercise of its police power, that the riparian owner could continue to have the right to the benefit and enjoyment of the waters of the stream both in the present and in the future insofar as he was able to put it to beneficial use on his own land but that beyond that he could not insist that the water flow by and beyond his land whether he needed it or not. Nevertheless this court adhered to the doctrine of *Lux v. Haggin* and by judicial interpretation made ineffective those provisions of the Water Commission Act of 1913 designed to restrict riparian rights to reasonable beneficial use. In *Herminghaus v. Southern Calif. Edison Co.* (1926), 200 Cal. 81 [252 P. 607], the court reannounced its adherence to the ancient doctrine and held in effect that no matter how unreasonable the claim of a riparian owner to the full flow of a stream might be he had the right to assert it.

Following that decision the Legislature sought to implant in the Constitution of the state, and there was subsequently incorporated in that document, the provisions of section 3 of article XIV, which again declared the

policy of the state "that the general welfare of the state requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use [627] thereof in the interest of the people and for the public welfare. . . . Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled."

The foregoing amendment to the Constitution as proposed by the Legislature in 1927 and adopted in November 1928 focused the attention of the courts upon the persistent endeavor of the people of the state, first through the Legislature in 1913 by the adoption of the Water Commission Act in that year and then by the constitutional amendment in 1928, to put into effect the doctrine of reasonable beneficial use. The obvious purpose of the new constitutional provision was to invite and urge a judicial declaration that the vested right of the riparian owner be subjected to that doctrine. Thereafter this court so declared. (*Gin Chow v. Santa Barbara* (1933), 217 Cal.

673 [22 P.2d 5]; *Peabody v. City of Vallejo* (1935), 2 Cal. 2d 351 [40 P.2d 486].) Within the scope of reasonable beneficial use, vested rights of the riparian owner continued to attach to his land as a part and parcel of the land itself, and as such was necessarily protected from unlawful encroachment by both state and federal Constitutions. The result is that this vested right as now defined may not be destroyed or infringed upon without due process of law or without just compensation under either Constitution.

No encroachment on the vested rights of riparian owners is directly involved in this proceeding, but the foregoing observations are pertinent as bearing upon the rights of the people of the state, both present and prospective, to avail themselves by appropriation or other lawful means of the right to the use of waters to which a prior lawful use has not attached. In this category the waters here sought to be furnished to and used by the landowners in the district must be classified. We are therefore here directly concerned with the title, distribution and use of water which has not heretofore been subjected to beneficial use except as contemplated by acquisition, by appropriation or otherwise on the part of the State of California and the United States.

It is thus apparent that the more recent changes in the [628] constitutional and decisional law of this state, had the effect of making available for beneficial uses by appropriation and other means great volumes of unappropriated domestic waters of the state. The nature of the title to the waters here involved is further indicated by the statutory law of this state. The title to these waters was

mentioned at an early date in the amendment of section 1410 of the Civil Code in 1911 which provided that "All water or the use of water within the State of California is the property of the people of the State of California" subject to appropriation and use in the manner prescribed by law. That provision in effect was carried into section 11 of the Water Commission Act of 1913 which provided that "All waters flowing in any natural water course in the state excepting so far as such waters have been or are being applied to useful or beneficial purposes, upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act." (Stats. 1913, p. 1018.) The same provision was carried into the Water Code in 1943 as section 102.

Section 104 of that code provides: "It is hereby declared that the people of the state have a paramount interest in the use of the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection." Section 105 of the same code provides that "It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the waters of the state, both surface and underground, should be developed for the greatest public benefit." Section 1052 of that code provides that the diversion or use

of water other than as authorized by the code is a trespass and the Department of Public Works, acting through the State Engineer, may initiate actions in the superior court to have the trespass enjoined.

It has long been the established law of the state that an irrigation district is trustee for the landowners within the district and limited in its trust to receive and distribute water to them. (*Merchants Nat. Bank v. Escondido Irr. Dist.*, 144 Cal. 329 [77 P. 937]; *Tulare Irr. Dist. v. Collins*, 154 Cal. 440, 442 [97 P. 1124].) In the Merchants Bank case the court stated: "But here, the corporation in question is distinguished [629] from ordinary municipal corporations by the fact that 'the legal title,' only of the property of the corporation is vested in the district, 'in trust for the uses and purposes set forth in (the) act'; and that the beneficiaries of the trust—who, upon familiar equitable principles, are to be regarded as the owners of the property—are the landowners in the district with whose funds the property has been acquired (Civ. Code, § 853); and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches, and property generally, as the means of supplying water. (Stats. 1887, pp. 34, 35, §§ 11, 13.) Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of the provision of section 13 of article I of the state Constitution . . . that 'no person shall be . . . deprived of . . . property without due process of law,' and of the similar provision of Sec-

tion 1 of the fourteenth Amendment to the constitution of the United States." (See also *Allen v. Hussey,* 101 Cal. App.2d 457, 472 [255 P.2d 674]; *Bottoms v. Madera Irr. Dist.,* 74 Cal.App. 681, 702 [242 P. 100]; *Colburn v. Wilson,* 23 Idaho 337.)

Likewise the state is not the owner of the domestic water of the state in the sense that it has absolute power and dominion over it to the exclusion of the rights of those who have the beneficial interest therein. The title is an equitable one residing in the water users of the state. The state as an entity is the holder of the legal title as trustee for the benefit of the people of the state, all of whom in the last analysis, are the water users of the state. (See *Hall v. Superior Court,* 198 Cal. 373, 383 [245 P. 814]; *Tulare Irr. Dist. v. Collins,* 154 Cal. 440, 442 [97 P. 1124]; *Merchants Nat. Bank v. Escondido Irr. Dist., supra,* 144 Cal. 329.) To avail themselves of the right thereto, individually, collectively or in a corporate capacity, administrative procedures have been established and are set forth in the Water Code and related statutory provisions. Compliance with those provisions is necessary in order that the right to use the water may be acquired, but always consistent with the trust relationship incident thereto. Occupying such a relationship it would be incompetent for the state to divest itself of the legal title, by grant, assignment or otherwise, in any way inconsistent with the rights of the beneficiaries. It would necessarily follow that it would be inconsistent with the trust for the state [630] to attempt to pass the legal title freed from the trust to any third party, including the United States. As trustee the state and its agencies, of

which the plaintiff district is one, are bound faithfully to administer that trust and are answerable to the courts, in the exercise of their traditional powers in equity, for the proper discharge of their stewardship. They must administer it consistently with and not in violation of the rights of the beneficiaries. (*Merchants Nat. Bank v. Escondido Irr. Dist., supra,* 144 Cal. 329; *Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co.,* 111 Cal.App. 688, 698, [296 P. 933]; *Allen v. Hussey,* 101 Cal.App.2d 457, 467 [225 P.2d 674].) But it is not to say that the state may not in the administration of the trust prescribe or provide for reasonable terms and conditions to which the beneficiaries must conform in order to have the benefit of expenditures made necessary in providing those benefits. These may be provided for by statute or, as here, by contracts when duly authorized by law.

The trust relationship existing between the state and the beneficiaries of the trust must therefore be kept in mind in connection with any transactions between the state or any of its agencies and outside parties. It follows that when an outside party, such as the United States, by contract, legislation or otherwise, steps into the shoes of the state to administer that trust by the development, conservation and distribution of the trust res, it is bound by the same rules of law as surround and govern the State of California or any other purveyor of water of the state for the benefit of its water users. The state may not therefore lawfully dispossess itself of the title to such water and may not surrender its control of the same in any way inconsistent with the administration of the trust under which the title is held. The state by general law

may and has in the main prescribed the terms and conditions under which the several classes of water users may become secure in their right to the water and use thereof. The water users of the state whose rights have not become vested within the classes above mentioned but who are dependent upon an adequate supply of fresh water for their existence in the manifold uses to which it may be supplied, have an inchoate right to such uses subject to like enforcement and equal protection of the law. This right is necessarily dependent upon compliance with reasonable rules and regulations attending it and to the circumstances of each case such as an adequate water supply, the ability of the supplier to furnish the water, reasonable payment for the [631] service and perhaps other conditions not necessary to mention in the conservation and distribution of a water supply in our complex civilization. This inchoate right of present and potential water users of the state is a right of which cognizance must be taken in dealing with the general subject of the water law of the state and in particular with the rights of landowners and water users within the plaintiff district.

It is therefore concluded that the title to the unappropriated domestic waters of the state is in the State of California in trust for the use and benefit of the beneficiaries of that trust; that the trust character of that title is anchored in the state by constitutional provisions, by statutes enacted in furtherance thereof, and by the decisional law of the state; that the beneficiaries of that trust are the water users of the state who in a general sense constitute all of the people of the state; that the beneficiaries of the trust relationship whose rights are here

under consideration are those present or prospective users who individually or in properly classified groups bring themselves within the orbit of the state law under which they may be in a position to demand benefits without discrimination, and that within that category are the landowners of the district. It is they who are in position to avail themselves of the right to beneficial use of the waters to be purveyed and to demand indiscriminate service. There is nothing in the foregoing declaration which interjects anything new into the water law of the state. It is but a recognition and redeclaration of existing fundamental concepts of this phase of our law.

It is well to consider at this point the federal law relating to the nature of the water rights acquired by the United States and affecting the rights of the land owners of the district thereunder. The Reclamation Act of 1902 (32 Stats. 388, 43 U.S.C. § 391) is the basic federal enactment on that subject. Under that law and subsequent laws in aid thereof, the Bureau of Reclamation is assuming to administer water through the Central Valley Project. Section 8 of the Act of 1902 provides: "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this Act shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or of the Federal Government or of any landowner, appropriator, or [632] user of water in, to, or from any inter-

state stream or of waters thereof; provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." The meaning and intent of section 8 of the Reclamation Act as it specifically applies to the waters involved in the Central Valley Project has been stated by the Supreme Court in *United States v. Gerlach Livestock Co., supra,* 339 U.S. 725. At pages 734-735 the court said: "Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation and maintenance of the several construction projects, Congress directed the Secretary of Interior to proceed in conformity with state laws, giving full recognition to every right vested under these laws. *Cf. Nebraska v. Wyoming,* 295 U.S. 40 [43 L.Ed. 1928, 1291, 55 S.Ct. 568]; *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 164 [79 L.Ed. 1356, 1364, 55 S.Ct. 725]; *Nebraska v. Wyoming,* 325 U.S. 589, 614 [89 L.Ed. 1815, 1829, 1830, 65 S.Ct. 1332]; *Silas Mason Co. v. Tax Com.,* 302 U.S. 186 [82 L.Ed. 187, 58 S.Ct. 233]. . . . . We think it clear that throughout conception, enactment and subsequent administration of the plan, Congress has recognized the property status of water rights vested under California law. The governing water law of California is now derived from a 1928 amendment to its Constitution . . ." (Art. XIV, § 1) ". . . to which," as the Supreme Court in the Gerlach case said, "the Federal Reclamation Act defers." (See also *United States v. Rio*

Grande Dam & Irr. Co., 174 U.S. 690 [19 S.Ct. 770, 43 L.Ed. 1136]; *State of Connecticut v. Commonwealth of Massachusetts*, 282 U.S. 660 [51 S.Ct. 286, 75 L.Ed. 602].) Thus the federal government both by legislation and court decision has recognized that the law of this state is determinative of rights to water in this state. This court also so held in *Peabody v. City of Vallejo*, 2 Cal.2d 351, at page 366 [40 P.2d 486].

We therefore feel free to declare that in all transactions between the United States and the State of California or its agencies such as the plaintiff district, the parties are dealing with trust property held by the state or by those who have acquired rights to it from the state or otherwise for the benefit of the real owners thereof. They are the present and prospective water users of the state who may become entitled thereto under the laws of the state. Whatever interest or title [633] the United States has acquired to water by appropriation, assignment or by other means of acquisition in furtherance of the execution of its trust relationship with the water users of the state is necessarily subject to the limitations of title herein determined.

It is to be observed that we are not here dealing with all of the problems incident to the relationship of the state and its agencies and the federal government in the construction, maintenance, control and operation of the works for the distribution and use of the domestic waters of the state. We are not here concerned with the ownership and control of interstate waters or any other waters coming within well recognized federal control. (See *Federal Power Com. v. State of Oregon* (June, 1955), 349

U.S. 435 [75 S.Ct. 832, 99 L.Ed. 1215].) We are not concerned with problems attending the title, sale, distribution and use of water in the development of government owned land for there are no federally owned irrigable lands within the plaintiff district. Nor are we concerned with questions relating to the sale and distribution of water by a privately owned public utility, nor with the distribution and sale of electrical energy developed through or by means of storage facilities constructed by the State of California or by the United States or both. We are here concerned only with questions of the title, sale and distribution of intrastate or domestic waters and with the title to the distributing system and facilities acquired for the specific purpose of irrigating the lands within the plaintiff district.

We now turn to the provisions of the contract in controversy. Considered in connection with the legislation surrounding it, both federal and state, the contract is an instrument which, from the standpoint first of its fiscal provisions, provides in Part B for the construction by the United States of a distributing system within the district for a specified consideration payable to the United States in 40 equal annual installments; and in Part A to furnish to the district and by it to the owners of irrigable lands within the district a supplementary supply of domestic waters of the state developed through the construction and operation of the Central Valley Project at a price per acre foot payable annually. The concept of repayment to the United States for its costs is the unmistakable theme throughout the entire transaction.

In entering into the contract the parties are dealing within statutory authorization but at arm's length. It is

not over simplification to state that the relationship of the parties so far as construction work is concerned is that of debtor [634] and creditor, for it is clear beyond question that they and the law under which they are operating contemplate that when the money expended by the United States has been repaid by the district or on its behalf, the district is entitled to an acquittance and will thereby become the owner of the distribution system and all of the property used and useful in the maintenance and operation thereof free and clear of any claims of others, to the same extent as if the district had constructed the distributing system itself with its own funds and had thus become the owner in trust for the water users within the district. As stated it is certainly true that it was within the power of the district under the laws of this state to do in the first instance all that the United States is obligating itself to do under the contract with reference to the construction of a distributing system. The district was authorized to obtain funds for that purpose by borrowing from the United States with or without the issuance of irrigation district bonds (Wat. Code, §§ 23280-23289) and it could contract for the payment for water distributed to it by or through an outside source at a fixed point of delivery upon the payment of the charges agreed upon from funds of its own, if available. (Wat. Code, § 22228.) In essence, therefore, we have here one party agreeing to provide the funds for construction work and undertaking to furnish water at a definite delivery point, and the other party agreeing to accept the water at that point with payment therefor at a fixed rate and repayment of the construction charges in installments within 40 years, coupled with what appears

to be all sufficient assurances of security in the event of nonpyament. Within the compass of those provisions there can be no doubt of the right and power of the parties to lawfully contract.

Included in the assurance of payment according to the contract are obligations on the part of the district to provide funds for repayment by taxation of the lands within the district, by assessments against the lands for that purpose and the fixation of water charges sufficient to provide the security required by the United States. It is the right of the United States to demand that assurances of security for repayment of monies advanced by it be included in the contract; and provisions to that effect are included therein. The contract goes further and provides that upon default in payments as they become due the United States shall have the right to take over the operation of the affairs of the district in order to assure timely and adequate repayment. Likewise, it is the right and duty of the district to have [635] included in the contract provisions for adequate clearance of its obligations to repay, including the designation therein of the amount expended or to be expended by the United States for the benefit of the district and its landowners, or to a workable provision thereir as to how the amount advanced by the United States may be ascertained when the time for final accounting, repayment and acquittance arrives, together with the designation of a definite time when repayment is finally due. The present contract does not with certainty set forth such fiscal matters, particularly as it relates to repayment for the construction of the major storage facilities from which water will be de-

livered to the district. Upon repayment the district would succeed to whatever title to lands, structures or works acquired by the United States within the district in aid of its activities on behalf of the district and the landowners within the district, in like manner and to the same extent as an ordinary debtor is entitled to a satisfaction of record evidencing the payment of his indebtedness.[3] (See *Owl Creek Irr. Dist. v. Bryson*, 71 Wyo. 30, at pp. 69-70 [253 P.2d 867, 258 P.2d 220].)

Although the relationship of debtor and creditor is clearly established on the record, it is not clear in what way the district and its landowners may become free of indebtedness upon repayment. For example, it is provided in the contract that the United States may acquire property within the district in its own name for the purpose of constructing the distributing system, and that pursuant to an act of Congress authorizing such acquisition of property for the benefit of the landowners of the district, the United States may divest itself of ownership only in such manner as may be provided by Congress. Obviously such a provision in the agreement is contrary to the debtor-creditor relationship existing between the United States and the district. The right and obligation on the part of the United States would seem to be to hold the property thus acquired by it in its own name

[3]In an obvious attempt to correct the uncertainty in contracts entered into pursuant to existing reclamation law, recent legislation by Congress has defined in greater detail the allocation of payments for water service between operation, maintenance and construction costs of reclamation projects. (Pub. L. No. 643, 84th Cong., 2d Sess. § 1(3) (July 2, 1956), 70 U.S. Stat. 483-484 (1956).) Such legislation, of course, was not in effect at the time the present contract was entered into and the judgment herein entered.

only until final repayment is made, with the right of the district to a conveyance thereof not dependent on a future and necessarily discretionary act of Congress. [636]

However, it is mainly because the contract includes provisions not relating to its fiscal aspects that the defendant landowner, the State Engineer representing the Division of Water Resources of the Department of Public Works and amici curiae are opposing it.

On behalf of the state, the attorney general first directs his attack upon that portion of the judgment which holds the 160-acre limitation of the contract void as applied to the state, to the district and to the owners of irrigable land within the district. The genesis of the 160-acre limitation is found in the original Reclamation Act of June 17, 1902, heretofore referred to. (32 Stats., p. 388.) That act is entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for reclamation of arid lands."

It is relatively a brief enactment. It occupies less than three pages of the Statutes at Large of the 57th Congress. Section 1 provides that all moneys received from the sale and disposal of public lands in western states should be set aside in a special fund known as the "reclamation fund." This fund is to be used in the examination and survey for and the construction and maintenance of "irrigation works, diversion, and development of water for the reclamation of arid and semi-arid lands in the said States and Territories." Subsequent sections provide that the Secretary of the Interior construct appropriate irrigation works; that he may withdraw certain

public lands from entry, or restore other lands to public entry; as such lands are required for irrigation works; "that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres"; that the Secretary may limit the area per entry of such public lands to be irrigated; that he shall fix the charges "which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project"; that no "right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident of such land"; that the Secretary is authorized to use the reclamation fund to accomplish the purpose of the act; that when repayments required by the act "are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the [637] management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby" except that "the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress," and that the Secretary may acquire, by judicial process or otherwise, the lands necessary to carry out the purpose of the act.

It is noted that the repayment period was originally 10 years as provided for in section 10 of the act. It was

increased to 20 years by the Reclamation Act of 1941. (38 Stats. 686, 687.) It was changed by the Second Deficiency Act of 1924 to an indefinite period determined by the productive power of the land. (43 Stats. 702.) It was again changed in 1926 to 40 years by the Interior Department Appropriation Act of 1927. (44 Stats. 479.)

It is readily observed from the provisions of the Reclamation Act of 1902 that one of its main purposes was to provide for the reclamation of vast areas in the 17 western states and territories where title to the land was still in the federal government as owner, and the development of that land into private ownership was deemed essential to the general welfare in establishing homes and small farming enterprises in the great western domain.

As a part of this farsighted plan of the federal government it was undoubtedly recognized that the desired result could best be accomplished by limiting the amount of land thus to be purchased and developed. To justify such a limitation in the contract in question, the attorney general points to other federal enactments which it is claimed were designed for the same purpose and which are claimed to have had the same effect. Among these enactments are the Homestead Act of May 20, 1862 (12 Stats. 392) where it was provided that the amount of land to be acquired by any one person from the federal government should not exceed 160 acres. Again on May 10, 1872, the Mines and Mining Act provided for a limitation on a mining claim usually running lengthwise on the vein of ore. (17 Stats. 91.)

Another illustration of a limitation placed by the federal government on the sale of its publicly owned land

is found in the Desert Land Act of March 3, 1877 (19 Stats. 377), where a limitation of 320 acres was placed on a purchase by one individual. One of the conditions of purchase of land under that act was that the entryman or purchaser provide for the water to reclaim the desert land. Another illustration [638] is the Timber and Stone Act of June 3, 1878, where a limitation for purchase by an individual was placed at 160 acres (20 Stats. 89).

Further research would probably disclose other illustrations, but sufficient have been noted to demonstrate that the federal government in all of such instances has exercised its power as the owner of the land to be offered for sale. No limitation on its power to sell and convey its own lands existed or could properly be asserted. The United States was the owner of the fee with all the rights of proprietorship. It could sell or refuse to sell as it pleased. It could and often did withdraw such lands from entry or sale. As proprietor it could part with its lands under such terms and conditions of sale it saw fit, including a limitation on acreage, price, term of payment, and otherwise. However, in its activities as the owner and grantor it controlled the limitation only as to the first purchasers. It is common knowledge that after the title passed to the buyer, the land then was subject to resale to grantees either private or corporate within the ordinary channels of purchase and sale in the field of private property acquisition and ownership. The buyer was then in position to sell to whom he pleased, or accumulate properties similarly purchased by others so that his total acreage might far exceed the original statutory acreage limitation.

We attribute no merit to argument on behalf of the respondents that the 160-acre limitation was conceived as a socialistic scheme to divide up private property for the benefit of the many at the expense of "larger landowners." It may not be denied that the 160-acre limitation originally had a social objective. It was designed to encourage home seekers to obtain and develop land owned by the federal government in the undeveloped western states and territories. The plan sought to arouse the interest of as many settlers as possible and to prevent, so far as could lawfully be done, the accumulation of large tracts of land by single individuals. This the government, as sole owner, could do as it pleased, without let or hindrance.

Contrasted with the social objective of a land limitation in furtherance of the plan to encourage individuals as home seekers to purchase government lands and to initiate and increase the productivity of undeveloped public lands was the objective of the federal government in another field. That was in the grant to corporations seeking to provide transcontinental transportation of alternate sections of land for 20 miles on each side of the railroad right of way, as provided for [639] in various acts of Congress. (See 43 U.S.C. § 881, et seq.) In a large sense it may be said that those grants had the social objective of aiding in the increase in population and development of the vast uninhabited expanse of land owned by the federal government by affording transportation more convenient, timely and certain than the covered wagon, the stage coach and the pony express.

The foregoing objectives and others which might be mentioned were well within the power and control of the

federal government as the owners of the lands to be granted or otherwise disposed of. But we are not here dealing with social objectives as such. We are here concerned with the question of the extent of power, dominion and control which the United States as a trustee may exercise to deprive beneficiaries of the trust, namely, the water users of the state and particularly those in the plaintiff district, of a property right thereunder or of an inchoate right to the use of water within the district.

Under articles 34, 35, 36, and 37 of the contract, the owner of land in excess of 160 acres is called a "large land owner," and lands in excess of 160 acres are called "excess lands." If a so-called "large land owner" desires to avail himself of the benefits of project water on any of his lands, he must select from his larger tract 160 acres of land which is to be retained by him for the use of water. If the landowner refuses to make the selection, the members of the board of directors of the district may do so without his consent. If they do not, the Secretary of the Interior makes the selection. Excess lands may not receive water unless prior thereto the landowner executes a recordable contract between himself and the United States, whereby he agrees to sell his land in excess of 160 acres within 10 years at a price to be fixed by an appraisal board consisting of one appraiser appointed by the district, one by the Secretary of the Interior, and the two choosing a third. The landowner has no voice in the appraisal. The appraised value must be fixed as of the time of the execution of the recordable agreement and the appraisal cannot take into consideration any increase in the value of the land resulting from the supply of water to the land, or from any other normal increase in

value such as might result from an increase in popula tion, an extraordinary increase in the productivity of th land or perchance the discovery of oil or other valuabl substances beneath the land. In practice, according t official government statements, the interpretation place on contractual provisions required by federal law (Sec tion 46, Omnibus Adjustment Act of 1926, 44 Stats. [640 636) similar to the excess land provisions here is as fol lows: "Thus the administrative procedure usuall adopted had been to refuse to deliver water to any lands excess or non-excess, until the owner of excess land ha executed a recordable contract agreeing to dispose of th excess." (Land Ownership Survey on Federal Reclama tion Projects, Department of the Interior [1946], p. 47.

It thus appears that the federal statute as interprete by those administering it states in effect to the owner o land within the district susceptible of irrigation: "If yo own more than 160 acres of land within the District yo may not enjoy one of the incidents of that ownership namely, the right to the use of water to which you ar entitled on all your land unless you agree to execute recordable contract to sell your land in excess of 160 acre within 10 years at a price fixed by a board of appraiser in whose selection you have no voice and at a price t which you do not agree." In addition, no account is take of the item of possible damage to the remainder of th land because of a possible severance, and a possible nat ural increment in land values.

The duty of both of the contracting parties in the per formance of their obligations to the landowners in th district is set forth in section 22250 of the Water Code. I

is there provided that water distributed by districts shall be "apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district" except as provided otherwise in the code. No pertinent exceptions appear.

In addition to his right to due process, the landowner McCracken is entitled to equal protection of the laws. Discrimination among water users in an irrigation district is expressly contrary to state law as expressed in the above quoted section 22250 of the Water Code. The well established rule on this subject is expressed in *City of Pasadena v. Stimson,* 91 Cal. 238 at pages 251 and 252 [27 P. 604] as follows: ". . . although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." (See also *Matter of the Application of Miller,* 162 [641] Cal. 687, 698 [124 P. 427].) Notwithstanding the fact that the 160-acre limitation has been a part of the Reclamation Law for more than 50 years, a diligent search has failed to disclose that the imposition of the limitation has been approved by any court of last resort, either state or federal, in a situation where the federal government had no interest in the lands to be irrigated and possessed only a trustee's interest in the waters to be applied. On the other hand the Supreme

Court of Wyoming in *Owl Creek Irr. Dist. v. Bryson, supra* (1953), 71 Wyo. 30, beginning at page 67 had the following to say with reference to the terms of a contract similar as to the excess land provisions to the terms of the present contract: "The large landowner is specifically defined in this subdivision and additional burdens imposed upon him. He is forbidden to receive water for excess lands until he acquiesces in all the conditions which by this and the two proceeding paragraphs are placed upon him. . . . These contract clauses which are thus questioned if applied to owners of private lands are unreasonable, coercive and devised to deprive them of their property against their will and without invoking the condemnatory processes which require due compensation to be made when land is thus taken. These proceeds embody the full protective machinery of the law as concerns the private property owner. These clauses now drawn in question . . . are subversive of the most elementary rights which our forefathers carried from English law to this country and which were centuries in their formation. . . . It is quite obvious if these contract clauses were to be scrutinized under the light of familiar constitutional limitations they would necessarily fall."

As to the acreage limitation of the contract, it is therefore concluded that the extent of the right of an owner of real property to the use and enjoyment of his property right, including the water right which may be attached thereto, cannot be constitutionally limited on the sole basis of the amount of property he owns. This is especially true with reference to property of the same kind and similarly situated. If there are any exceptions to the rule

which should be applied, they have not been pointed out, nor, on reflection, are they apparent. In other words there appears to be no basis founded in reason or authority why the owner of a property right which is or may be appurtenant to all of his land suitable for irrigation can be limited in the enjoyment of that right to 160 acres of his larger holdings. The same right should attach to his lands in excess of 160 acres and to the excess lands [642] of all those similarly situated. Thus to deprive members of the same class of their rights clearly results in an unlawful discrimination which as said in *Pasadena v. Stimson, supra,* 91 Cal. 238, is not "founded upon some natural or intrinsic or constitutional distinction." If a constitutionally authorized preferment may be extended only to owners of 160 acres of land or less the question might well be asked whether a like preferment might not be extended only to owners of more than 160 acres. The suggestion of either preferment under the long and well established rule governing classification is enough to demonstrate its impropriety.

Notwithstanding the long prevailing provisions of the original Reclamation Act of 1902 that in the construction and operation of the reclamation projects under the supervision of the Secretary of the Interior, rights vested under state law should not be disturbed and should be protected, the contract in controversy is proposing to transgress those vested rights. The plaintiff district and the United States, through its Bureau of Reclamation, are parties to the contract but as to both the record discloses that they deemed themselves bound by federal law to include these provisions in the contract. That law is included in the

original Reclamation Act of 1902. (32 Stats. p. 388.) It was reenacted and supplemented by the Omnibus Adjustment Act of 1926 as amended. (44 Stats. 636, § 46, now U.S. Public Lands Code Anno., 1955, § 423e.) Section 46 of that act requires that any contract with an irrigation district bearing the approval of the Secretary of the Interior shall include the 160-acre limitation. It is to be noted that this omnibus act covers many subjects dealing generally with federal reclamation projects where the intention of the act as shown by section 48 was the development of public lands and the rehabilitation of some 20 federal reclamation projects theretofore existing in many of the western states. The omnibus act is now included, in material parts, in Title 43 United States Code, sections 1 to 670, inclusive. This volume is entitled "The Code of the Laws of the United States of America, Title 43, Public Lands." A survey of this code shows that its provisions deal generally with the control, development and sale of public lands of the United States and section 46 may be deemed to apply to public lands alone. If, however, its general language as to the 160-acre limitation be considered as applicable to the purchase by the United States of unappropriated domestic waters of this state and, as here, its distribution to irrigation districts and privately owned lands in the state, such a construction would [643] obviously remove it from consideration as an "applicable" law governing the execution of the contract in question. Since its attempted application to the contract is unauthorized under the laws of this state it is necessarily not an "applicable" law. Also carried into the Public Lands Code of the United States is the provision

of the original Reclamation Act of 1902 that state laws remain unaffected by later enactments. This was recognized by the Supreme Court in the Gerlach case as late as 1950 where it said that when Congress directed the Secretary of the Interior to proceed under the Reclamation Act of 1902 he should not interfere with the laws of the state " 'relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder.' (32 Stats. 388, 390.)" (*United States v. Gerlach Livestock Co., supra,* 339 U.S. 725, at page 739.) As indicated the federal law could be applicable only on the theory that the United States is the owner absolute of the domestic waters of the state with the right to the use thereof freed from any trust relationship on behalf of the real owners thereof, namely, the water users in the district. As also indicated such a theory is untenable and it necessarily follows that the inclusion in the contract of articles 34, 35, 36 and 37 cannot be legally justified.

Attention has been called to section 23200 of the Water Code providing that under contracts such as the one in question water "shall be distributed and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract." It is argued that since the 160-acre limitation is contained in the Federal Reclamation Act of 1902 the state, the owners of irrigable lands and the water users are subject to that limitation. But such is not the case. Section 23200 contemplates that *applicable* federal law shall apply. As previously noted the 160-acre limitation is inapplicable in the present case where the title to the water to be purveyed is not an unlimited title in the United States.

An important question relating to the debter-creditor nature of the contract is raised by the attorney general and concerns matters which the State Engineer as Chief of the Division of Water Resources deems essential to what is said to be the established water law in this state. We have heretofore declared the debtor-creditor nature of the contract in question. In arriving at that conclusion it was considered that applicable federal law requires that the contract specify a specific amount [644] of money to be repaid by the district by installments, within 40 years; that this is an obligation for repayment of the cost of construction of storage and delivery works, and that the payments by the district be credited against this obligation.

The attorney general asserts that this is an incorrect construction of the federal Reclamation Project Act of 1939 (53 Stats. 1195, 1196). He states that under present federal law the repayment of construction costs to the United States is governed by both section 9(d) and 9(e) of that act. Section 9(d) provides in part:

"No water may be delivered for irrigation of lands in connection with any new project, new division of a project, or supplemental works on a project until an organization, satisfactory in form and powers to the Secretary, has entered into a repayment contract with the United States, in a form satisfactory to the Secretary, providing among other things . . . (2) That the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation of the organization . . . (3) That the general repayment obligation of the organization shall be spread in annual installments, of the num-

ber and amount fixed by the Secretary, over a period not exceeding forty years, exclusive of any development period fixed. . . ."

As section 9(d) is read in the light of its particular provisions and of the general law, it is authority for the terms of Part B of the contract which provides for the repayment of a stipulated sum in installments within 40 years. If the construction obligations are not paid within the times specified, the remedies for the enforcement of payment by assessment, taxation and possibly other means are provided for in the contract.

Section 9(e) of the Reclamation Project Act of 1939 provides: "In lieu of entering into a repayment contract pursuant to the provisions of subsection 9(d) of this section, to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into short or long term contracts to furnish water for irrigation purposes. Each subcontract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated [645] to irrigation, and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the cost of any irrigation water distributing works constructed by the United States in con-

nection with the new project, new division of a project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to said subsection (d)."

In view of the last sentence of section 9(e), it is conceded by the attorney general that Part B of the contract for the construction of the physical works is a repayment contract, but the question raised is whether the water delivery portions of the contract (Part A) are invalid because of inferences which may be drawn that the district and landowners therein are not entitled to water rights which continue beyond the 40-year term of the contract.

It is contended by the attorney general that the United States has properly contracted as a water purveyor under section 9(e). The State Engineer contends that the United States improperly assumes to take section 9(e) as its authority for an alternate method of contracting with the state, that is, that the United States has construed that section to mean that, in lieu of a definite contract for repayment within 40 years, the United States may waive or avoid the repayment provisions in regard to its water rights and obligation to supply water to the district and substitute therefor the right to renew or not to renew the contract as the occasion might suit its purpose and elect to continue to serve the district with water but under terms and conditions which it might impose in the nature of an utility service, with no power upon the part of the district as the contracting agency of the state to prevent it from so doing. It is claimed by the State Engineer that the United States and particularly the

Bureau of Reclamation and its legal advisers have decided that section 9(e) contains such authorization. The record supports that contention by documents and transcripts of hearings before Congressional committees which need not now be set forth at length.

It is because of this asserted authorization to the Bureau of Reclamation that the State Engineer is much concerned. The effect of the validation of this contract would be, impliedly at least, to approve a procedure by which the United States as a purveyor of the domestic waters of this state, might continue indefinitely to by-pass the established law of the state and procedures thereunder applicable to water services generally. [646]

In furnishing its domestic waters to consumers at a price, the activities of the United States under its purported construction of section 9(e) resemble those of a public utility acting in a proprietary capacity. As above noted, the Reclamation Act of 1902 provided that: "'Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws. . . .'' It may fairly be said that the foregoing federal statutory provision remains in full force; that it controls the operations of the Department of the Interior so far as federal law is concerned, and that under the controlling state law, the furnishing of water to consumers by a utility must be subject to and be in conformity with certain rules and

regulations established by or under the authority of the Constitution and the statutes of the state.

Moreover, as we have already held, whatever title the United States has to the domestic waters of this state is limited by the trusteeship under which that title was acquired. The United States cannot administer the corpus of that trust except in the manner defined by the terms of the trust, namely, the applicable water law of this state. The attorney general argues that in this validation proceeding it is not necessary to consider what might or might not be contemplated at the termination of the contract, but the water rights of the landowners in the district, as members of the class to which the beneficiaries of the declared trust belong, are present and existing (see *Ickes v. Fox*, 300 U.S. 82, 93-94 [57 S.Ct. 412, 81 L.Ed. 525]), and they are entitled to a declaration thereof. "By directing the Secretary to proceed under the Reclamation Act of 1902, Congress elected not 'to in any way interfere with the laws of the State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder.'" (*United States v. Gerlach Livestock Co., supra*, 339 U.S. 725.) If this contract were construed as imposing upon the district and the landowners therein a burden under which they may suffer the loss of water rights at the discretion of the United States, such a construction would be contrary to well established constitutional principles and protections.

The validity of the contract is sought to be established under the Second Validating Act of 1949. (Stats. 1949, p. [647] 1511.) The attitude of the United States is reflected

in the position of the attorney general to the effect that "any non-constitutional defects in the contracts under state law" were cured by the act.

The act became effective on October 1, 1949, which was 90 days after the final adjournment of the Legislature of that year. The act "confirmed, validated, and declared legally effective . . . all Acts and proceedings heretofore taken by a public body under any law, or under color of any law, for the authorization" of "all instruments evidencing indebtedness of a public body incurred or to be incurred for any public purpose. . . ." The act includes proceedings taken by "counties, cities and counties, cities, public districts of every kind or class" and some 50 other specifically named public bodies, including irrigation districts. The attorney general contends that "this language clearly covers contracts between irrigation districts and the United States for a water supply and distribution system construction."

In this connection it appears that at the time the Second Validating Act of 1949 was passed by the Legislature the contract was not in existence; that it was not approved by the electors of the district until August 23, 1949, and that it was not signed until September 23, 1949. It would seem that validating statutes cover only those transactions or omissions which occur before the Legislature adjourns. Such acts no doubt serve a useful purpose but as said by Chief Justice Beatty in *Oakland v. Oakland Water Front Co.*, 118 Cal. 160 at pages 194 and 195 [50 P. 277]: "It is to be regretted . . . that a court should ever feel itself bound by rules of construction to give effect to statutes which ratify and confirm by wholesale

the acts of municipal or other political agencies of the state. There is no more reckless or dangerous species of legislation. It is really legislating with the eyes shut, and . . . should . . . be closely scrutinized and strictly considered in order to prevent as far as possible the evils which they involve. . . ."

If the position of the attorney general be sustained, it would mean that from the time of the final adjournment of the Legislature on July 2, 1949, to October 1, 1949, every city, city and county, county, and some 50 specifically named other public entities or agencies of the state could run full rein in violation of all of the laws of the state governing and regulating the making of contracts and the incurring of obligations for the payment of public moneys thereunder not constitutionally otherwise controlled. Likewise, within that [648] 90-day period they could do anything not yet subjected to regulation but which could be constitutionally authorized and this situation would continue during the 90 days after the final adjournment of the Legislature. A validation act assumes legislative consciousness of some act or omission on the part of the public body affected which is designed to be cured or confirmed. After the final adjournment of the Legislature and until the effective date of the act (90 days thereafter) there is no opportunity for the exercise of this legislative purpose to function. Obviously the only purpose of postponing the effective date of the act is to permit the referendum provision of the law to be made available.

Furthermore if the contract be deemed to include a utility type contract at the option of the United States, the Second Validating Act of 1949, or any validating act of

the character of the one here relied upon by the attorney general, could not render such a contract valid. It is well settled that the Legislature may ratify only what it could have theretofore authorized. It is obvious that the Legislature could not by a general ratifying statute breathe validity into a contract the effect of which would be to avoid all of the laws of the state, both constitutional and statutory, respecting the regulation and control of public utilities in this state. Assuming the plenary power of the Legislature to enact laws respecting the regulation and control of public utilities notwithstanding any provision of the Constitution to the contrary, (Art. 12, § 22, Constitution) nevertheless such legislation must appear on its face to be cognate and germane to the regulation of public utilities to come within the Legislature's plenary power. (*Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 655, 656 [137 P. 1119, Ann.Cas. 1915C 822, 5 L.R.A.N.S. 652].) There is nothing on the face of this ratifying statute to indicate in the slightest degree that it relates to the regulation and control of public utilities. It is therefore ineffective to circumvent the laws of the state requiring regulation and control of activities which are in all essential respects those of a public utility. In addition any validating act could not have confirmed the 160-acre limitation for the obvious reason that the Legislature could not have theretofore constitutionally authorized it.

The district attorney of Ventura County has filed a brief as amicus curiae on behalf of the Ventura County Flood Control District. He calls attention to the declaration of the trial court in its conclusion of law to the effect that when water is furnished by a purveyor of water

under the laws of [649] this state to a landowner for irrigation purposes such owner thereby acquires a vested right to the continuance of such service.

Objection to the views of the trial court in this respect is made on the ground that they do not correctly reflect the present laws of the state on the subject. This is the only cause of concern on the part of counsel for the flood control district. The background for this objection is disclosed by the following facts: The Ventura Valley has highly developed urban and interurban industrial and agricultural areas which have been subjected to a shortage of water with threatened need of further sufficient supply. To alleviate this water condition the Ventura County Flood Control District was organized under chapter 44 of the Statutes of 1943 (p. 168). One storage dam has been constructed and another is in the course of construction or nearly completed. The distribution systems have not been completed but water is stored in the reservoirs. Pending the completion of the distribution systems the district is furnishing to certain lands outside of the district some of the stored water under contracts with the users that when the system within the district is completed and water made available to landowners within the district the use of water outside of the district will terminate. This arrangement was made because of the dire need of water on lands without the district for even temporary purposes and perhaps to tide the owners thereof to a time when they could develop an additional supply of water on their own behalf. If this temporary agreement with the outside land owners is not permitted because of the declaration

of the trial court, increasing amounts of water now in storage and to be stored in the reservoirs of the Ventura district will be required to go to waste.

There is no law of this state which may properly be invoked to prevent such a temporary arrangement. The question is pertinent to the present case because of the fact that a supplemental water supply has been furnished to land owners in the Ivanhoe Irrigation District by the United States for an extensive period pending the negotiations for a contract such as involved in the present proceeding.

There appear to be early cases to the effect that when a purveyor of the domestic waters of the state furnishes water to lands for irrigation purposes, the right of the owner of the lands to a continuance of the use may not be cut off. The rules of the earlier cases have in general been modified by enactments in the Water Code of the state with reference [650] to the use of water as authorized by the Constitution. As bearing on the right acquired by user in particular cases, including the rights of landowners in connection with the administration of the water law of the state Legislature has provided in division 11 (irrigation districts), part 5, chapter 2, article 2 (water distribution, § 22262) as follows: "No right in any water or water right owned by the district shall be acquired by use permitted under this article." (Stats. 1943, p. 1897, based on Stats. 1897, p. 259.) An identical provision is contained in that portion of the code pertaining to Water Districts (Wat. Code, § 35428). Other code provisions provide authority for entities supplying public water to serve some of their territories with water and not serve

others in the event of shortages. (Wat. Code, §§ 22252.1, 35435; Pub. Util. Code §§ 2708, 2710, 2711.)

It is claimed that article 26 of the contract purports to condition the delivery of water to a landowner otherwise entitled to delivery, upon the payment by him of any assessment levied although it has been judicially declared to be a void assessment. It seems unusual that a party should, except under compulsion, contract to pay an assessment declared to be void by a court of competent jurisdiction. But when taken as a reasonable and additional assurance of reimbursements to the United States for expenditures incurred on behalf of the district and to cover operating expenses in furnishing water to the district, it may be deemed a legitimate subject of contract.

Questions are raised as to the sufficiency of the notice of election whereby the electors of the district were called upon to approve the proposed contract, and the trial court concluded that the contract was invalid for lack of proper notice. (Wat. Code, § 23223.) These questions need not be determined in this case for the reason that upon submission of any further proposed contract they need not recur.

The trial court in its findings of fact and conclusions of law declared the contract to be invalid on numerous additional grounds not carried into the judgment. Conclusions that the contract is uncertain, lacks mutuality, improperly delegates powers to the Secretary of the Interior, improperly prevents changes in the boundaries of the district, provides unreasonable security measures to the United States and other conclusions not necessary to the judgment are insufficiently supported when considered in connection with the views herein expressed as to the terms under which the parties may properly contract. [651]

In accordance with the foregoing it is concluded:

(1) That the plaintiff is an irrigation district duly organized, existing and operating as such under the laws of this state.

(2) That the title of the unappropriated domestic waters of the state in the State of California in trust for the water users of the state as beneficiaries and such waters are subject to appropriation under the laws of the state.

(3) That the United States as assignee of appropriative rights, as original appropriator thereof, and in the acquisition of other rights for the same purpose stands in the same relation to such beneficial owners as does the state, namely, as trustee for such beneficial owners and is answerable for the faithful performance of that trust.

(4) That in distributing the water contracted to be delivered to the District the United States does so as a purveyor of water at a price for the benefit of the water users of the District.

(5) That in so delivering the water to the District it is not competent for the United States or the District, either or both, to discriminate against the present or potential water users in the District on the basis of the amount of land owned by them, and that the 160-acre limitation contained in the original Reclamation Act is inapplicable to the subject matter of the contract and is improperly contained therein.

(6) That insofar as the contract provides for the constructure of words for the storage and distribution of water to and by the district, the relationship of the parties is that of contractor and contractee. Upon the completion

of the construction work the district is obligated under the law to pay for the same within 40 years in equal annual installments. Upon the completion of such payments the district is entitled to ownership of the works and property of the storage and distribution system free from any claims of the United States.

(7) That insofar as the contract provides for furnishing water to the district at a price the United States in acting as a purveyor of domestic waters of the state to the district, under federal law, is bound to observe and comply with the laws of the state with reference to the rights which are vested in the water users being served or entitled to be served. In this respect neither the state nor any of its agencies may contract or otherwise provide that the distribution of water [652] to those for whose benefit the right to the water was acquired may be arbitrarily discontinued.

The judgment is affirmed.

Schauer, J., Spence, J., and McComb, J., concurred.

GIBSON, C. J.—I dissent.

The holding of the majority opinion, which invalidates the 160-acre water limitation and other vital provisions of the contract between Ivanhoe Irrigation District and the United States Government, undermines the very foundation of federal reclamation policy and threatens to end the flow of federal funds into this state for reclamation and irrigation purposes at a time when the need for rapid development of our water resources is most critical. In reaching its conclusion the majority ignores the Irrigation

District Federal Cooperation Law of this state, relies on a statutory provision relating to the apportionment of water by districts which is inapplicable to water from a federal project, and enunciates a trust theory with respect to the ownership of water which has no basis in existing law, is unsound in principle, and will prove a serious obstacle in the resolution of state-wide problems involving the distribution and utilization of available water supplies for domestic and industrial purposes, the irrigation of land, and the production of power.

The Central Valley Project, which is now nearing completion, is a federal undertaking being built under the provisions of the national reclamation laws. Since the passage of the Federal Reclamation Act in 1902, the federal statutes have imposed a limit on the amount of irrigation water from federal projects which will be sold to any one landowner, namely, sufficient water to meet the needs of 160 acres of land. In California, by reason of our community property law, the limitation has been interpreted as allowing a man and a wife to buy sufficient water to supply 320 acres. (Graham, "*The Central Valley Project; Resource Development of a Natural Basin*" (1950), 38 Cal.L.Rev. 588, 608-611.) The restriction is not a limit on the amount of land a person may own. There is nothing in the governing federal statute, section 46 of the Omnibus Adjustment Act of 1926, which compels an individual who owns more than 160 acres to sell any of his land as a condition to receiving water sufficient for 160 acres. (44 U.S. Stats. 649, 43 U.S.C.A. § 423e (Supp. 1955).) He may retain all his land, receiving federal project water for the first 160 acres and irrigating the

remainder with whatever [653] other water may be available. It is only where he elects to request delivery of federal project water for the portion of his land in excess of 160 acres that he may be compelled to dispose of the excess land within a period of time fixed by the Secretary of the Interior. (See Graham, op. cit., 38 Cal. L.Rev. at pp. 606-608.)

The suggestion that the limitation may not have been intended to apply to lands held in private ownership prior to construction of a reclamation project flies in the face of specific language in the statute of 1902, which provides that no right to the use of water "for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner. . . ." (32 U.S. Stats. 389, 43 U.S.C.A. § 431.) Subsequent enactments contain similar provisions making specific reference to lands in private ownership. (36 U.S. Stats. 926 (1911), 43 U.S.C.A. § 524; 37 U.S. Stats. 266 (1912), 43 U.S.C.A. § 544; 38 U.S. Stats. 689 [1914], 43 U.S.C.A. § 418; 44 U.S. Stats. 649-650 (1926), 43 U.S.C.A. §423e (Supp. 1955); see Graham, op. cit., 38 Cal.L.Rev. at p. 616.). The Omnibus Adjustment Act 1926 expressly requires that contracts between the federal government and irrigation districts shall contain the acreage limitation as a condition to delivery of water from a federal project. (44 U.S. Stats. 649-650, 43 U.S.C.A. § 423e (Supp. 1955).) Thus the water limitation in the Ivanhoe contract follows the requirement of the federal statute, and, unless the statutory limitation may properly be construed as inapplicable in California, or is declared unconstitutional, or is removed from the law by congressional action, the representatives of the

federal government would have no power to negotiate a new contract without it.

Local irrigation districts are authorized by *state law* to enter into contracts with the federal government for a water supply *on terms required or authorized by federal law*. Direct authority for the action of the Ivanhoe district is found in the California Water Code which, since its adoption in 1943, has contained a chapter known as the Irrigation District Federal Cooperation Law (§ 23175 et seq.), most provisions of which are based on statutes originally enacted in 1917 (Stats. 1917, ch. 160). Section 23195 provides: "Districts may cooperate and contract with the United States under the Federal Reclamation Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto or any other act of Congress heretofore or hereafter enacted permitting cooperation." No delegation of legislative power is involved, and the state law clearly authorizes a contract which includes the provisions [654] of the Federal Omnibus Adjustment Act of 1926. Section 23196 of the Water Code authorizes districts to contract with the United States for a water supply and for acquisition and operation of works for irrigation.

With respect to the delivery, distribution, and *apportionment* of water among irrigators, section 23197 provides that district contracts with the federal government may include provisions for "(a) Delivery and distribution of water for the land in the district *under the relevant acts of Congress and the rules and regulations established thereunder*. . . ." and section 23200 provides, "All water, the right to the use of which is acquired by a district under any contract with the United States shall be *distri-*

buted and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract, . . ." (Italics added.)

The majority takes the position that sections 23197 and 23200 must be construed as referring only to federal acts which do not conflict with state law and that the 160-acre limitation in the contract is invalid because it assertedly conflicts with section 22250 of the state Water Code which provides that water shall be apportioned ratably to each landowner on the basis of the last assessment against his land for district purposes.[1] The only reasonable interpretation of sections 23197 and 23200 is that the Legislature intended to authorize irrigation districts to enter into contracts with regard to the delivery, distribution, and apportionment of federal project water under the terms imposed by Congress as a condition to participation of the federal government in such contracts. The substance of section 22250 is contained in statutes enacted long before there was any water limitation in the federal reclamation law and before this state adopted the Irrigation District Federal Cooperation Law, the express purpose of which was to enable irrigation districts to secure the assistance of the United States Government in obtaining a water supply.

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[1]Section 22250 of the Water Code provides: "All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes." The substance of this section was included in the statutes of 1887, page 34, section 11. It also appears in the statutes of 1897, page 259, section 18.

Moreover, section 22250 is a *general* provision governing the distribution of irrigation water by districts, [655] and it is obviously qualified by the more recent provisions in sections 23197 and 23200 which relate *specifically* to the distribution and apportionment of federal project water under contracts between irrigation districts and the United States. As we have seen, sections 23197 and 23200 authorize the acquisition of a supply of water from the United States and direct that such water shall be distributed and *apportioned* by the district in accordance with the applicable acts of Congress, the rules established thereunder, and the provisions of the contracts. It follows that section 22250 cannot prevail here in the face of the water limitation which is required by the federal statute and which is thus authorized by sections 23197 and 23200.

It should also be noted in considering the effect of section 22250 that the statute should not be interpreted as fixing the exclusive method of apportioning available water among landowners in all irrigation districts in the state. Section 22250 appears in part 5 of division 11 of the Water Code relating to the powers and purposes of irrigation districts, and, to be at all intelligible, it must be read in connection with the provisions in part 5 and elsewhere relating to the financing by a district of the cost of constructing, maintaining and operating an irrigation system. Aside from incidental sources of revenue, there are two major methods of financing a district irrigation system under the Water Code: (1) ad valorem assessments on land in the district (§ 25500 et seq.; see §.25503); and (2) tolls charged to district irrigators for water delivered and other services (§ 22280) et seq). Where all district costs

are financed by levying ad valorem assessments on district land, the formula for water apportionment set out in section 22250 is clearly applicable and, when coupled with a provision such as section 22251 authorizing a landowner to assign any or all water apportioned to him, is reasonable. (*Fallbrook Irr. Dist. v. Bradley* (1896), 164 U.S. 112 162-163 [17 S.Ct. 56, 64, 41 L.Ed. 369].) But, once an irrigation system is in operation and the district, as it may, finances a share or all of its expenses by means of charging rates or tolls to actual water users, it seems clear that the formula for water apportionment in section 22250 is not intended to apply.

The uncertainties and inequities of the assessed-land-value formula for water apportionment were discussed in *Willard v. Glenn-Colusa Irr. Dist.* (1927), 201 Cal. 726, 741-743 [258 P. 959], where this court upheld the constitutionality of a 1911 statute providing that, "In lieu (either in part or in [656] whole) of levying assessments," irrigation districts have the power to raise all or part of the cost of operating and maintaining an irrigation system by means of charging rates or tolls to actual water consumers. (Cal. Irrig. Dist. Act, § 55, Stats. 1911, p. 516 [now Wat. Code, § 22280]; see Water Code, § 25655.) It was pointed out that the assessed-land-valuation formula for water apportionment created hardship and uncertainty for owners of land having a relatively low assessed valuation but containing crops which required more water than the land would be entitled to under the formula for water apportionment. "On the other hand," states the opinion, "by giving to the board of directors [of an irrigation district] the power to raise the whole or a part of the

cost of maintenance by tolls . . . every land owner of the district is given an opportunity to the extent of the water supply of the district of securing a definite, certain, and adequate supply of water for his lands." (201 Cal. at p.743.) While the question of water apportionment was not before the court, the language of the opinion clearly indicates that the formula for apportionment in section 22250 is not applicable in a situation where all or part of the district expenses are paid by means of charging rates or tolls to actual water users rather than by levying an ad valorem tax on district land.

Ivanhoe and most of the other irrigation districts in the state have adopted the practice of defraying costs of maintenance and operation by means of a combined system of levying assessments and charging rates or tolls to actual water users. (See *Willard v. Glenn-Colusa Irr. Dist.*, 201 Cal. at p. 744; Cal. Dept. of Pub. Works, Div. Water Resources, Bull. 21K, "Report on Irrigation Districts of California for the year 1939," pp. 8, 22; *ibid.*, Bull. 21P, "Report on Irrigation Districts in California, 1944-1950," appendix.) The services for which tolls and rates may be charged have been gradually extended. (See Wat. Code, § 22280.) Section 25655 provides that revenues derived from such rates or tolls may be spent for "district purposes" generally, and section 25219 authorizes their use to pay principal and interest on construction and refunding bonds. Hence most, if not all, district expenses may ultimately be financed not by assessments but by tolls charged to acual water and power consumers (see *Willard v. Glenn-Colusa Irr. Dist.*, 201 Cal. at pp. 740-741), and the Legislature could not have intended that the water

apportionment formula in section 22250 should be applicable under such circumstances.

Even if it be assumed, for the sake of argument, that there [657] is a conflict between section 22250 and the water limitation provisions of the federal statutes, the assertion by the majority that section 8 of the 1902 Reclamation Act provides for the supremacy of state law is untenable. Section 8 provides: "Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws. . . ." However, as stated in *Nebraska v. Wyoming* (1945), 325 U.S. 589, 612, 615 [65 S.Ct. 1332, 89 L.Ed. 1815], section 8 will not be construed in every instance to mean that "where Congress has provided *a system of regulation* for federal projects it must give way before an inconsistent state system." (Emphasis added.) In the present case it is conceded that all water rights necessary to construction of the irrigation system have been acquired by the federal government in strict compliance with state law. The question before us is how a future supply of water from the completed federal project, *water not hitherto available*, shall be apportioned among district landowners. The 160-acre water limitation is clearly part of a "system of regulation" for federal projects within the meaning of the language quoted above from *Nebraska v. Wyoming* and thus appears to fall in that area where section 8 does not compel federal law to

give way before inconsistent state legislation; hence, if there is any state-recognized vested right which, in fact, conflicts with the acreage limitation, that right may be taken and compensated for by the federal government under its power of eminent domain. (See *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 733, 739 [70 S.Ct. 955, 94 L.Ed. 1231]; 32 U.S. Stats. 389, 43 U.S.C.A. § 421 (Supp. 1955); Rivers and Harbors Act of 1937, § 2, 50 U.S. Stats. 844, 850.) The question of compensation for loss or threatened invasion of a vested water right is not before us.

In holding the Ivanhoe contract invalid, the majority opinion invokes the aid of a "trust" theory assertedly based on general state law. The theory is that unappropriated domestic water is owned by the state in trust for water users and that the federal government can acquire no title to appropriative water rights free of such trust. For reasons hereinafter stated, it is my opinion that the trust theory is erroneous, but, if it be assumed that such a trust exists, it is clear, as indicated above, that there is nothing in the federal water [658] limitation which conflicts with state law, state water policy, or the best interests of the water users of the state, hence nothing which can be held to constitute a breach of trust.

There is no legal basis for the trust theory developed by the majority opinion. The Constitution and statutes of California reserve to the state considerable control over the use to which domestic water shall be put but contain nothing which creates a trust as to such waters. Section 3 of article XIV of the Constitution provides in substance that the water resources of the state must not be wasted,

that conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare, and that the right to the use or flow of water from any natural stream or water course in the state is limited to such water as shall be reasonably required for the beneficial use to be served. Sections 104 and 105 of the Water Code provide, in effect, that the state may regulate the use of water in the interest of the people. These and other general regulatory provisions apply to all water and water rights, whether riparian, appropriative or underlying, and whether privately or publicly owned.

The fact is that no declaration of trust is intended or effectuated by these general provisions enunciating water policy and providing for regulation, and they are in no way inconsistent with the existence of full title to water rights in the state or in private persons. While the use to which certain property may be put is controlled by state law, this does not mean that the owner thereof has something less than full title. It adds nothing to the strength and effectiveness of the laws regulating the use of water to say that they give rise to a trust relationship between the state and water users, but, to the contrary, such language threatens to confuse the development of our water law. The very use of the term "trust" draws with it the problem of applying settled trust principles to all water rights in the state, or at least to those acquired by appropriation—a problem which will certainly be attended by much uncertainty and difficulty.

Let us examine the trust theory as applied to the water rights involved in the present proceeding. The United

States is acquiring the water rights necessary to completion of the project by means of (1) assignment of applications for appropriation made by the state, (2) applications for appropriation made directly by the United States, and (3) purchase and exchange agreements made by the United States with certain private owners of riparian rights to divert the flow of the [659] San Joaquin River. (Graham, op. cit., 38 Cal.L.Rev. 596-600.) With regard to the first two, which relate to hitherto unappropriated water, even if it be assumed that all unappropriated water and water to which an appropriative right is not fully perfected belongs to the state, the ownership rights of the state do not differ from its rights in other state-owned property. Certainly the state has full title to the water and water rights which belong to it, and the people, acting through their representatives and within the limits of the Constitution, may dispose of it as they see fit. There may be occasions when the state would find it necessary to weigh the interests of a small group of potential water users against those of a much larger group, but it is difficult to see how this would be possible if all waters users of the state have equal rights as beneficiaries of the trust, and it would be even more difficult if, as suggested, the water users of a particular district are the sole beneficiaries of a trust in all waters which may ever be brought into the district. Application of a trust theory, in such a situation, would be an obstacle to the development of a water plan otherwise consistent with the best interests of a majority of the people. In the absence of any specific constitutional or statutory provision establishing a trust, it is improper for this court to restrict the power of

the state Legislature and the people as a whole by the device of declaring that such a trust relationship exists.

The series of cases beginning with *Merchants Nat. Bank of San Diego v. Escondido Irr. Dist.*, 144 Cal. 329 [77 P. 937], which are cited in support of the trust theory, are not in point because they deal not with the relationship of the state to domestic waters but rather with the functions of irrigation districts under statutes which, like section 22437 of the Water Code, specifically declared that such a district held its property "in trust" for the purposes of the district.

Nor is there anything in section 102 of the Water Code which supports the trust theory. The section reads, "All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." Nothing in this language is inconsistent with the view that the state holds and can convey full and complete title to the water rights which it owns. And it is settled that the broad statement, "All water within the State is the property of the people of the State," has no application to privately owned water or water rights. *(San Bernardino v. Riverside,* 186 Cal. 7, 29-30 [198 P. 784].) The court in the San Bernardino case said [660] with respect to this broad language, "Taken literally, this would include all water in the state privately owned and that pertaining to lands of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this manner take private property for public use. . . . The constitution expressly forbids it. (Art. I, § 14.) The water that pertained

to or was contained in the lands of the state was already the property of the people when this [statute] was adopted. The statute was without effect on any other property." (186 Cal. 7 at pp. 29-30.)

With respect to the third method by which the United States is acquiring water rights, i.e., through purchase and exchange agreements made with private owners of riparian rights, it is clear that under the well-recognized principles set forth above such rights are not subject to a trust.

We have been cited to no case which holds that the state or private persons cannot hold full and complete title to water or water rights, and the constitutional and statutory provisions regulating the use of water which are relied on by the majority opinion do not, even by remote implication, require or justify the application of a trust theory in this field. Under existing law water may be used only for beneficial purposes, and all property of the state is held for the benefit of the people and is subject to use and disposition only in their best interest. The application of formal trust principles in this field thus appears to be totally unwarranted. Moreover, the ramifications of the trust theory as applied by the majority are infinite, technical and unpredictable and, as pointed out above, may prove to be a handicap in the future development of the water resources of this state.

The water rights acquired by the United States must, of course, be used in accordance with federal law. Under section 8 of the Reclamation Act appropriations may be made by the federal government, not for its own use, but only for the use of landowners; the right to the use of

water acquired under the act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. (*Nebraska v. Wyoming* (1945), 325 U.S. 589, 614-615 [65 S.Ct. 1332, 89 L.Ed. 1815].)

The suggestion that the 160-acre limitation violates principles of equal protection and due process is without merit. This court cannot, of course, properly enter into a discussion of the wisdom of the limitation or the desirability of having it apply to the farming economy of the central valley in California. [661] These are matters for Congress to determine. The limitation has remained in the federal reclamation law for over 50 years and has survived numerous efforts to eliminate it.[2] (Taylor, "*The Excess Land Law: Execution of a Public Policy*" (1955), 64 Yale L.J. 477, 502-503.) It seems clear that the limitation upon the amount of water from a federal irrigation project to be sold to any one landowner creates a reasonable classification in furtherance of the purposes of the federal legislation. The federal government does not propose to recover the entire cost of building the Central Valley Project, and its construction and operation will result in a considerable subsidy to irrigators.[3] They will have the long term use of

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[2]In three instances Congress specifically exempted certain reclamation projects in Colorado, Nevada and California from the limitation, but all attempts to obtain such an exemption from the Central Valley Project have failed. (Taylor, op. cit., at pp. 502-503.)

[3]That portion of costs allocated to navigation and flood control (approximately 12 per cent of total estimated cost) is nonreimbursable. Of the costs for which the United States will be reimbursed, expenditures allocated to irrigation represent approximately 63 per cent of the total. Of the remainder, costs allocated to municipal and industrial water supply represent approximately 3 per cent of total reimbursable cost; that allocated to power develop-

federal money necessary to finance the construction of dams, storage and distribution systems for their benefit, free of interest, and will bear the ultimate cost of only a small part of the capital outlay allocated to irrigation construction. The water limitation was intended to prevent use of the reclamation service for speculative purposes, and it insures that the irrigators' subsidy and other benefits of federal irrigation projects will not go in disproportionate share to a few large landowners but will be confined to holders of moderate-size tracts of land sufficient to maintain one family; its purpose, in other words, is to distribute the government benefits in accordance with the greatest good for the greatest number of individuals. (Graham, op. cit., 38 Cal. [662] L. Rev. at 617.) Any vested rights of the landowners which are taken by the federal government must, of course, be compensated for, but the problems of compensation are not within the issues of this proceeding. It should be noted in this connection that none of the landowners in the district has riparian rights or perfected appropriative rights to the

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ment represents 33 per cent. (See note, 38 Cal.L.Rev. 728, 730, citing H.R. Doc. No. 146, 80th Cong., 1st Sess. 23 (1947).) Federal money expended for irrigation purposes is advanced free of interest over long periods of time, and, in the allocation of repayment obligations under plans formulated by the Bureau of Reclamation, irrigators are scheduled to repay the United States only 17 per cent of total reimbursable costs or, stated otherwise, approximately 35 per cent of the costs allocated to irrrigation. (Harding, "*Background of California Water & Power Problems*" (1950), 38 Cal.L.Rev. 547, 564.) The difference is proposed to be made up by users of project power and municipal and industrial water who are scheduled to pay rates designed to return approximately 82 per cent of total reimbursable cost. (Harding, op. cit., 38 Cal.L.Rev. at 564; Graham, op. cit., 38 Cal.L.Rev. at 622; Maass, "Administering the C.V.P." (1950), 38 Cal.L.Rev. 666, 672; Note, 38 Cal.L.Rev. 728, 730.)

waters involved here and that the land of Courtney McCracken, the individual defendant who is opposing confirmation of the contract, is located about 100 miles from the river from which such waters come.

We turn now to a consideration of the effect of the provisions in the Ivanhoe contract relating to the method by which the district irrigators shall reimburse the federal government for a part of the costs incurred in construction of the federal project. As noted earlier, the federal government proposes to recover from irrigators only a portion of the construction costs allocated to irrigation, and the federal reclamation laws now provide two methods by which the United States may recover this amount. Under section 9(d) of the Reclamation Project Act of 1939, based on provisions contained in earlier reclamation laws, an organization of irrigators and the federal government may enter into a repayment contract by the terms of which the government agrees to supply water at a rate to be fixed by the Secretary of the Interior, and the local organization agrees to repay a fixed sum representing its share of total construction costs allocated to irrigation. The Secretary fixes the sum of the organization's repayment obligation and sets the amount and number of annual installments sufficient to repay the sum within 40 years. It was found that this method lacked flexibility (see note, 38 Cal.L.Rev. 739, 740-741; Maass, op. cit., 38 Cal.L.Rev. 666, 672), and, in 1939, section 9(e) of the Reclamation Project Act created an alternative method for repayment by irrigators of the costs incurred by the federal government in constructing project units other than water distribution works located inside the

district.[4] Under contracts authorized by section 9(e) there [663] is no agreement by the irrigators to pay a definite sum within 40 years to cover costs of project construction but, instead, the federal government, under short or long term contracts for a period not exceeding 40 years, agrees to deliver water to the local organization at a rate fixed by the Secretary which is sufficient to include some return to the federal government on construction costs as well as costs of operation and maintenance.

In the present contract, costs incurred by the federal government in constructing a water distributing system *inside* the Ivanhoe district are covered by a 9(d) type provision. The contract does not contain any express provision for repayment of a share of the costs of constructing portions of the project located *outside* the district, such as Friant Dam and other units of the Central Valley Project. It provides merely that the United States is to furnish

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[4]Section 9(e) of the Reclamation Project Act provides as follows: "In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to said subsection (d)." (53 U.S. Stats. 1193, 61 U.S. Stats. 501, 43 U.S.C.A. § 485h(e) (Supp. 1955).)

water and the district is to pay for it at an acre-foot rate to be fixed annually by the Secretary, in no event in excess of $3.50 per acre foot. It is argued that the contract is defective because there is no specific requirement that a definite portion of that rate shall be allocated to repayment of the district's share of the costs of constructing project facilities outside the district. However, the applicable provisions of section 9(e) must be read into the contract, and they provide that the water rate fixed by the Secretary shall be such as will produce revenue sufficient to cover an appropriate share of annual operation and maintenance costs "and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation."

It is obvious under section 9(e) that the water rate to be fixed by the Secretary under the Ivanhoe contract is to include a construction component and that revenue produced in excess of operation and maintenance costs is to be treated as repayment by the district of its share of construction costs, and it is immaterial that the contract does [664] not specifically so direct. Any question as to this interpretation of section 9(e) must now be regarded as settled by a recent statute providing, among other things, that in administering sections 9(d) and 9(e), the Secretary of the Interior shall "credit each year to every party which has entered into or which shall enter into a long-term contract pursuant to said subsection (e) so much of the amount paid by said party on or before the due date as is in excess of the share of the operation and main-

tenance costs of the project which the Secretary finds is properly chargeable to that party. Credit for payments heretofore made under any such contract shall be established by the Secretary as soon after the enactment of this Act as it is feasible for him to do so. After the sum of such credits is equal to the amount which would have been [sic] for repayment by the party if a repayment contract under subsection (d) had been entered into, which amount shall be established by the Secretary upon completion of the project concerned or as far in advance thereof as is feasible, no construction component shall be included in any charges made for the furnishing of water to the contracting party and any charges theretofore fixed by contract or otherwise shall be reduced accordingly." (Pub. L. No. 643, 84th Cong., 2d Sess. § 1(3) (July 2, 1956), 70 U.S. Stats. 483-484 (1956).)

It has been suggested that the 9(e) type of contract places the federal government in the role of a utility, a mere seller of water, and that district irrigators can never acquire permanent, appurtenant water rights thereunder. Such reasoning, however, overlooks the clear declaration which has appeared in the reclamation law since its enactment in 1902 that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, . . ." (32 U.S. Stats. 390, 43 U.S.C. § 372.) It is not reasonable to suppose that anything in the provisions of section 9(e) has in any way altered this basic purpose of the reclamation law. (*Cf. Nebraska v. Wyoming,* 325 U.S. 589, 614-615 [65 S.Ct. 1332, 89 L.Ed. 1815].) Moreover, it is now expressly directed that the Secretary of the Interior, in administering

sections 9(d) and 9(e), shall provide that the other party to any contract entered into pursuant to those sections "shall, during the term of the contract and of any renewal thereof and subject to fulfillment of all obligations thereunder, have a first right . . . to a stated share or quantity of the project's available water supply . . . and a permanent right to such share or quantity upon [665] completion of payment of the amount assigned for ultimate return by the party, subject to payment of an appropriate share of such costs, if any, as may thereafter be incurred by the United States in its operation and maintenance of the project works." The Secretary is expressly authorized to amend existing 9(e) contracts to make their language conform to this act. (Pub. L. No. 643, 84th Cong., 2d Sess., §§ 1(4), 2 (July 2, 1956), 70 U.S. Stats. 483-484.)

It has also been urged that neither section 9(e) nor the Ivanhoe contract contains a provision authorizing renewal of the water delivery provisions beyond 40 years and that the federal government is, therefore, under no obligation to continue to supply water beyond the 40-year period. The Department of the Interior has construed the reclamation law to mean that construction costs allocated to irrigation may be recovered by means of 9(e) contracts in any reasonable period within the useful life of the project, and the rates presently established for the Central Valley Project are calculated to effect full recovery of the costs of the major units by the year 2009. There is nothing in section 9(e) which requires the recovery of all construction costs within 40 years or which forbids the renewal of water delivery contracts for periods beyond that time. This interpretation must be regarded as settled by the

provision recently added to the reclamation law which authorizes the Secretary, if requested by the other party thereto, to amend existing contracts entered into under section 9(e) to include a provision for renewal. The Secretary is also authorized, upon request, to amend existing 9(e) contracts to include a provision contemplating conversion of the 9(e) contract into a 9(d) type repayment contract at a time in the future when the amount remaining due the United States by the other party is so small that is can probably be discharged in annual installments within the period fixed by law for 9(d) contracts, i.e., at present, 40 years. (Pub. L. No. 643, 84th Cong., 2d Sess. §§ 1(1), 1(2), 2 (July 2, 1956), 70 Stats. 483-484.)

There is no merit in the argument that the contract is defective because it fails to state that, upon repayment of all construction costs, the district shall succeed to whatever title the United States has acquired to property in the district in connection with the project. The contract provides that "Title to all of the Project works, including the distribution system constructed by the United States pursuant to this contract, shall be and remain in the name of the [666] United States until otherwise provided for by the Congress, notwithstanding the transfer hereafter of any such works to the District for operation and maintenance." This provision is required by the reclamation law. (32 U.S. Stats. 389, 43 U.S.C.A. § 498.) There is no reason why the parties cannot agree that the title to the project works shall remain in the United States after repayment of construction costs. The provision is a reasonable method of assuring that the various properties of the project shall remain devoted to the purposes for which

the federal funds were expended, and, in the absence of a showing that the provision violates the Constitution, or a statute or some rule of policy, we should not hold it to be invalid. There is nothing in the contract or in the reclamation law which precludes Congress from transfering title to project property to the district after all terms of the contract are performed, and it will be up to the district to press its claim thereto at such a time. It is not the business of the courts to determine whether the contract provision is a wise one from the standpoint of the district; the question is one of validity.

The conclusions expressed above make it unnecessary to consider whether the Second Validating Act of 1949 (Stats. 1949, p. 1511) is applicable to the contract.

I would reverse the judgment.

Traynor, J., concurred.

CARTER, J.—I dissent.

The majority opinion is based upon at least two fundamental misconceptions of law. First, this case does not involve water rights in the ordinary sense. That is, it does not involve questions relating to the right to divert and use water from a stream or other source; questions of priority or riparian ownership or beneficial use of water as defined in our statutes and court decisions. It involves the validity of a contract between the government of the United States and an irrigation district organized and existing under the laws of this state.

Second, even if the law relating to water rights were involved, the theory enunciated in the majority opinion of

title to all domestic water being held in trust by the state is fundamentally unsound and unsupported in law, tradition, history, public policy, practice or human experience.

A brief statement relative to the origin and development of the Central Valley Project and its objectives will demonstrate [667] that the contract here involved was entered into in accordance with federal and state law and is therefore valid.

The Central Valley Project was originally authorized by the State of California for construction by its Water Project Authority under the Central Valley Project Act of 1933 (Cal. Stats. 1933, § 1042, p. 2643, effective after referendum action, January 13, 1934, now Wat. Code, § 11100 et seq.). No action was taken by the Water Project Authority for the construction of this project, but on September 10, 1935, President Roosevelt, by executive order, transferred $20,000,000 under the Federal Emergency Relief Appropriation Act of 1935 to the Department of the Interior, Reclamation Service, for construction of Friant Dam on the San Joaquin River. The project was thereafter constructed as a reclamation project pursuant to the Reclamation Act above referred to and acts amendatory thereto. There is no question but that the United States government complied with all of the provisions of the law of California in the acquisition of the water rights incident to this project and that the construction, operation and maintenance of the storage dams and facilities are in every respect in accordance with the laws of this state. It is likewise clear that this project was constructed in accordance with the laws of the United States and that the authority exercised by the Reclamation Service in storing

and distributing the water developed by said project is strictly in accord with both the laws of the United States and of the State of California. Such being the case, we must look to these laws to determine whether or not the state agency involved in this case had the authority to enter into a contract with the United States government for the purchase of the water developed by said project. There is no question but that both the federal and state laws authorize the execution of such contracts. So far as our state law is concerned, the contract here involved is expressly authorized by the Irrigation District Federal Cooperation Law (Wat. Code, § 23175 et seq.) of this state which authorizes a state agency to contract with the United States for a water supply (Wat. Code, § 23196a), and to deliver, distribute, and apportion this supply as required by federal law (Wat. Code, §§ 23197a, 23200).

The contract here involved is also expressly authorized by the federal laws relating to the reclamation of arid lands of the west, and particularly by section 9c of the Reclamation Project Act of 1939 (33 Stats. 1939, p. 1196, 43 U.S.C., § 485h(c) 1946 F.R.L.A. 600), and section 46 of the Omnibus Adjustment Act of 1926 (46 Stats. of 1926, p. 649, 43 U.S.C., [668] § 423e 1946 F.R.L.A. 318). These laws, in themselves, and in conjunction with the state laws do not deprive anyone of property without due process of law, nor deny to anyone equal protection of the laws, and do not derogate from the powers reserved to the state under the Tenth Amendment to the Constitution of the United States.

There is no provision of law in this state which imposes any restriction against an agency of this state from en-

tering into a contract with the United States involving the subject matter of the contract here under consideration. The 160-acre limitation for the use of water from a reclamation project has been in existence since 1902 and this provision has never been successfully assailed as impinging any constitutional right of anyone who has been called upon to comply with the provisions of the Reclamation Act.

We are not here concerned with the social and economic philosophy which was the background of the inclusion of the 160-acre limitation in the Reclamation Act. It is not our province to declare whether this provision of law is good or bad. It was adopted by Congress after many years of debate, and although numerous assaults have been made against it, Congress has not only refused to delete it from the act but has on two occasions, once in 1926 and again in 1939, expressly reaffirmed their belief in the wisdom of this provision. Neither has the Legislature of California seen fit to disapprove the inclusion of this provision in the contracts which it has authorized state agencies to negotiate with the United States government for the distribution of water from reclamation projects. The fact that in the case here involved the inhabitants of the district which negotiated the contract containing the 160-acre limitation, voted overwhelmingly in favor of said contract, should be persuasive evidence that the provision is not detrimental to the social and economic welfare of the people affected by it.

With respect to the title to the unappropriated waters of this state, the statutes of this state declare that "The sovereignty of the State resides in the people thereof. . . ."

(Gov. Code, § 100), and that "All property within the limits of the State, which does not belong to any person, belongs to the people" (Gov. Code, § 182). Since the power of sovereignty is vested in the people, and all property within the limits of the state, which does not belong to any person, belongs to the people; it follows that the unappropriated waters of the state are owned by the people under their power of sovereignty. The people have, through the Constitution, dele- [669] gated this power to the executive and legislative branches of the government. The Legislature of this state has provided by law a comprehensive system for the appropriation, distribution and use of the waters of this state, including the impounding and storage of the seasonal run-off for distribution and use for beneficial purposes. I refer to the Water Code of this state adopted by the Legislature in 1943 which contains the following provisions (among others) with respect to the ownership, appropriation and use of the domestic waters of this state:

"102. All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.

"103. In the enactment of this code the Legislature does not intend thereby to effect any change in the law relating to water rights.

"104. It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection.

"105. It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit.

"106. It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (Wat. Code, §§ 102, 103, 104, 105, and 106.)

In the adoption of the state Water Code, the Legislature has made it abundantly clear that anyone complying with the laws of this state may be granted a right to appropriate and use any unappropriated water which he can put to a beneficial use. The government of the United States, acting under valid acts of Congress, may become an appropriator of any of the unappropriated waters of this state the same as any other public or private corporation or individual who complies with the law of this state governing the appropriation and use of such waters.

After reviewing the history of the water law of California the majority opinion states: "It is therefore concluded that the title to the unappropriated waters of the state is in the State of California in trust for the use and benefit of the [670] beneficiaries of that trust; that the trust character of that title is anchored in the state by constitutional provisions, by statutes enacted in furtherance thereof, and by the decisional law of the state. . . ." The majority opinion does not cite any constitutional or statutory provision

or any decision of any court of this state which supports the foregoing statement. On the contrary there is not a single constitutional or statutory provision or decision of any court of this state from which it is possible to draw such conclusion. The words trust or trustee or trust relationship do not appear in any constitutional or statutory provision or any court decision of this state dealing with the title or ownership of water by the State of California.

The reasoning of the majority with respect to the right of the beneficiaries under the so-called trust to the beneficial use of water seems incoherent. It proceeds from the premise "... that the title to the unappropriated domestic waters of the state is in the State of California in trust for the use and benefit of the beneficiaries of that trust;... that the beneficiaries of that trust are the water users of the state who in a general sense *constitute all of the people of the state;* that the beneficiaries of the trust relationship whose rights are here under consideration are *those present or prospective users* who individually or in properly classified groups bring themselves within the orbit of the state law under which they may be in position to demand benefits without discrimination, and that within that category are the landowners of the District." (Emphasis added)

Under the foregoing line of reasoning no vested right may ever be acquired by any individual or group of individuals to appropriate and use a given quantity of water for a beneficial purpose even though they have complied with all the provisions of the statutory law of this state, as the state would have no power to grant a specific right to any individual unless every other individual who may

have a use for water has received his share. The following practical example may demonstrate the absurdity of the reasoning of the majority. It is a matter of common knowledge that there are vast areas of land in this state which have no available water supply. Under existing law, however, an individual or group of individuals may acquire a right to develop a water supply from unappropriated waters (see Wat. Code, §§ 1252, 1252.5, 1253, 1350, 1375, 1380, 1390, 1450, 1455) by pumping from wells or storage of run-off which may be adequate to supply the limited areas owned by those who develop such supply. However, [671] there may be other areas in the same locality for which no water is available because of the prior appropriation and development of the supply made available to those who first obtained a permit and proceeded with the installation of facilities for the appropriation and use of the entire available supply. It is obvious that under the trust theory advanced in the majority opinion, the state could not grant a right to one user which would deprive another of his share even though the first appropriator was devoting all of the available water to a beneficial use on his land. In this connection the majority opinion states, "The trust relationship existing between the state and the beneficiaries of the trust must therefore be kept in mind in connection with any transactions between the state or any of its agencies and outside parties. It follows that when an outside party, such as the United States, by contract, legislation or otherwise, steps into the shoes of the state to administer that trust by the development, conservation and distribution of the trust res, it is bound by the same rules of law as surround and govern the State of California or any other purveyor of water of the state for the benefit of

its water users. *The state may not therefore lawfully dispossess itself of the title to such water and may not surrender its control of the same in any way inconsistent with the administration of the trust under which the title is held. The state by general law may and has in the main prescribed the terms and conditions under which the several classes of water users may become secure in their right to the water and use thereof.*" (Emphasis added.) But the state has not classified water users nor prescribed the terms and conditions under which they may become secure in their right to the water and use thereof on any theory of trust relationship between it and the users. On the other hand the state has provided that an individual or group of individuals may obtain a permit to appropriate and use a specific quantity of water, and to the extent that such appropriation is prior in time, it is prior in right to other appropriations and constitutes a vested right protected by the due process clauses of both the state and federal Constitutions. (See Wat. Code, §§ 1450, 1455; *Temescal Water Co.* v. *Department of Public Works*, 44 Cal.2d 90 [280 P.2d 1].) In this connection, the Water Code provides (see Wat. Code, § 1252.5) that the government of the United States may acquire a water right by appropriation in the same manner as any individual or corporation. The foregoing provisions of the Water Code are in clear conflict with the so-called trust [672] theory advanced in the majority opinion. It should be perfectly obvious that the provisions of the Water Code above cited which confer a vested right upon appropriators of water, including the United States, cannot stand in the face of the holding of the majority here that the state holds the title to all the

unappropriated domestic waters of the state in trust for all of the water users of the state, as it cannot be denied that the effect of the provisions of the Water Code which authorize the granting of permits for the appropriation and use of the unappropriated waters of the state by individuals and private and public corporations, including the United States, is to deprive some of the beneficiaries of the trust of their share of the trust res—water—by the first come, first served policy with respect to the appropriation of the unappropriated domestic waters of the state as declared in the Water Code. The majority opinion expressly states that "The state may not therefore lawfully dispossess itself of the title to such water [unappropriated domestic water] and may not surrender its control of the same in any way inconsistent with the administration of the trust under which the title is held." The inevitable conclusion which must be reached from the reasoning of the majority opinion is that all unappropriated domestic waters of the state are held in trust for the use of all of the people of the state who are in a position to put their respective shares of the water to a beneficial use and that such beneficiaries have the right to demand and receive their respective shares of such water as beneficiaries of said trust. In this connection the majority states "It is they who are in a position to avail themselves of the right to beneficial use of the waters to be purveyed and to demand indiscriminate service."

It must be remembered that there is no provision in either the state or federal law which purports to allocate any portion of the water developed by the Central Valley Project to the plaintiff in this action or to any other

agency, group or individual. The allocation and distribution of said water is a matter to be provided for by contract entered into pursuant to the provisions of the federal and state laws on this subject. After reviewing its trust relationship theory the majority opinion states "There is nothing in the foregoing declaration [trust relationship between state and present or prospective water users] which interjects anything new into the water laws of this state. It is but a recognition and redeclaration of existing fundamental concepts of this phase of our law."

If the majority is aware of any prior declaration of this [673] or any other court of this state invoking the trust relationship concept to state-owned water rights it has failed to disclose the source or location of such declaration. While it may not be new to the majority, it is both new and novel to me and is basically unsound.

The only authorities upon which the majority rely for the so-called trust relationship are the following: *Merchants Nat. Bank* v. *Escondido Irr. Dist.*, 144 Cal. 329 [77 P. 937]; *Tulare Irr. Dist.* v. *Collins*, 154 Cal. 440 [97 P. 1124]; *Hall* v. *Superior Court*, 198 Cal. 373 [245 P. 814]; *Lindsay-Strathmore Irr. Dist.* v. *Wutchumna W. Co.*, 111 Cal.App. 688 [296 P. 933]; *Allen* v. *Hussey*, 101 Cal.App.2d 457 [225 P. 674]. None of these cases even mentions the question of title or ownership of the unappropriated domestic waters of the State of California. They deal exclusively with the rights of landowners within irrigation districts to receive their respective proportions of the water which the irrigation district has acquired for the use and benefit of the lands within the district. It is obvious that in administering the distribution of water to land-

owners within an irrigation district, the district is acting as a trustee and the landowner a beneficiary, as the landowner supplies the funds which enable the district to acquire and distribute the water, and the district should be required to distribute available water to landowners on a fair and equitable basis so that there will be no discrimination between them. It is clear that the landowner within an irrigation district has no property right in any particular quantity of water, as the title to the water is vested in the irrigation district which is required to distribute it to the landowners in accordance with the latters' needs. The situation with respect to the ownership of unappropriated domestic water by the state is entirely different. The state does not undertake to distribute any particular quantity of water to anyone. It has established an agency (the Division of Water Resources) to determine the quantity of water available and to grant permits for the use of such water to those making application therefor in accordance with the law. There is no provision of law requiring the Division of Water Resources to supervise the distribution of water covered by permits issued by said division, and if the right of the permittee is violated by a third person, he must resort to the courts for the enforcement of his right. The Water Code makes it crystal clear that anyone complying with its provisions may acquire the right to use water by appropriation in the manner provided by law. [674] (See Wat. Code, § 102.) The right so acquired is a property right and protected by the due process clauses of both the state and federal Constitutions.

The concept of the trust character of title to the domestic waters of this state being vested in the State of Cali-

fornia as enunciated in the majority opinion is clearly out of harmony not only with the Constitution and statutes of this state but with the decisional law as well. This is demonstrated by the discussion in the majority opinion relative to the development of the law relating to water rights in this state. At the beginning of this discussion the majority opinion refers to the case of *Lux* v. *Haggin* decided by this court in 1886 (69 Cal. 255). Referring to the holding of this court in *Lux* v. *Haggin, supra,* the majority states: "The doctrine was declared to be that the owner of real property bordering such a river or stream had a right co-existent with the same rights of other landowners on the stream, to the use of its waters and the flow thereof as it was 'wont to do in the course of nature' unimpaired in quality and undiminished in quantity. This right was declared by this court in *Lux* v. *Haggin, supra,* 69 Cal. 255, to be a right appurtenant to the land, in fact a part and parcel of the land itself. Under this doctrine the riparian owner had the right to insist that the full flow of the stream continue to pass his land in its natural state whether he needed the water or not. This riparian right as so defined was declared by this court to be a property right which vested in the riparian owner and as such was protected by the state and federal Constitutions. It could not be limited or impaired without due process of law and without just compensation." It is conceded by the majority that the rule announced in *Lux* v. *Haggin, supra,* continued to be the rule of decision in this state until 1933 when this court was persuaded by opinions prepared by the facile pen of Mr. Justice Shenk (see *Gin S. Chow* v. *City of Santa Barbara,* 217 Cal. 673 [22 P.2d 5]; *Peabody* v. *City of Vallejo,*

2 Cal.2d 351 [40 P.2d 486]) to hold that this doctrine was no longer applicable and was supplanted by the doctrine of reasonable use even as against appropriators. It should be noted that the theory of the trust character of title to water rights had not then been conceived by Mr. Justice Shenk as no mention was made of this theory until now. It would seem, however, that if the state ever held the title to the domestic waters of this state in trust, it did so from the beginning; that is, from the time the state was admitted into the union and became an [675] entity capable of exercising ownership and possession of property. The majority here do not claim that this trust theory of title to water rights originated with the adoption of the Water Commission Act in 1913 or the adoption of the amendment to the Constitution in 1928 (Cal. Const., art. XIV, § 3) or with the sweeping pronouncements contained in the decisions of this court in the Gin Chow and Peabody cases. This theory must have originated and come into being when the Constitution of 1849 was adopted and existed at the time this court decided *Lux* v. *Haggin, supra,* in 1886, and during all of the intervening years when this court was applying the doctrine announced in *Lux* v. *Haggin.* Such being the case, can it be said that the doctrine of *Lux* v. *Haggin* and all of the other decisions of this court in water rights cases between 1886 and the decision of the Gin Chow case in 1933 is compatible with the theory that the State of California held the title to the domestic waters of the state in trust for water users who are said to be the beneficiaries of the so-called trust. The answer is obvious. The declaration of the riparian right doctrine in *Lux* v. *Haggin, supra,* is clearly repugnant to any trust concept.

Under this doctrine the riparian owner got title to the riparian right when a patent was issued to him for his riparian land whether that patent came from the state or federal government. Under this doctrine the right to have the full flow of the stream past his land unimpaired in quality and undiminished in quantity except by the reasonable use of another riparian owner, was a vested right, a part and parcel of the land itself and protected by the due process clauses of both the state and federal Constitutions. (*Miller & Lux* v. *Madera Canal etc. Co.*, 155 Cal. 59 [99 P. 502, 22 L.R.A.N.S. 391].) While the majority opinion does not purport to express or declare what was the genesis of the so-called trust title theory, there are declarations in said opinion from which an inference might be drawn that the Water Commission Act plus the 1928 constitutional amendment plus the doctrine announced in the Gin Chow and Peabody cases gave rise to such theory. After discussing the effect of the foregoing the majority opinion states: "It is thus apparent that the more recent changes in the constitutional and decisional law of this state, had the effect of making available for beneficial uses by appropriation and other means great volumes of unappropriated waters of the state." I have difficulty attempting to rationalize the foregoing statement. If the state ever had title to the waters referred to, it never [676] lost it. If it did not have title to said waters, the title must have been vested in others. If it was vested in others, the only manner in which it could acquire title thereto was by purchase or the exercise of its power of eminent domain unless the users voluntarily abandoned the waters and made them available for appropriation and use by others. Certainly,

the Legislature could not by statute nor the people by the adoption of a constitutional amendment nor could this court by a valid rule of decision divest an owner of a valid title to a water right any more than any of those departments of government could validly divest an owner of private property of his title to lands or personal belongings. What really happened in this melee of incongruity is that this court saw fit to change the riparian right doctrine from that announced in *Lux* v. *Haggin*, *supra*, to the so-called reasonable use doctrine as announced in the Gin Chow and Peabody cases by holding that the *Lux* v. *Haggin* doctrine had become outmoded and was not adapted to the arid conditions existing in this state. What this court did in the said last mentioned decisions had the effect of overruling all of the former decisions of this court from *Lux* v. *Haggin* in 1886 to *Herminghaus* v. *Southern Calif. Edison Co.*, 200 Cal. 81 [252 P. 607], decided in 1926, as it is obvious that said rule could not be changed without overruling said cases which had held that the riparian right doctrine as announced in *Lux* v. *Haggin* was a vested property right protected by the due process clauses of both the federal and state Constitutions. What Mr. Justice Shenk did in the Peabody and Gin Chow cases was simply to ignore the holding of this court in *Miller & Lux* v. *Madera Canal etc. Co.*, 155 Cal. 59 [99 P. 502], by holding that the doctrine of reasonable use even as against an appropriator did not violate the due process clauses of the federal and state Constitutions. I have heretofore stated that I would have arrived at the same conclusion by forthrightly overruling all of the decisions of this court applying the *Lux* v. *Haggin* doctrine as being unsound in prin-

ciple and based upon a misapprehension of the law applicable to water rights (see dissenting opinion in *City of Pasadena* v. *City of Alhambra,* 33 Cal.2d 908, at p. 938 [207 P.2d 17]).

The majority opinion correctly states that the decision of this court in *Lux* v. *Haggin, supra,* was based upon the declaration contained in section 4468 of the Political Code which provided at that time as follows: "The common law of England, so far as it is not repugnant to or inconsistent [677] with the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the courts of this state." But the majority opinion is in error when it states: "This court took the general language of that declaration by its four corners and applied the English common law doctrine of riparian rights to the ownership, control and use of the waters of the rivers and streams of the state." While it is true that the majority of this court in its opinion in *Lux* v. *Haggin, supra,* assumed that the riparian right doctrine as there declared was based upon the common law of England, such assumption was erroneous and without foundation in fact or law as there now appears to be no doubt that the riparian right doctrine was not a part of the common law of England but a part of the civil law and the first reference to it is contained in the Code Napoleon, the French Civil Code, in the year 1804. The first decision announcing the riparian right doctrine in any common law country was the case of *Tyler* v. *Wilkinson,* 4 Mason 397 [F. Cas. No. 14312], which was written by Mr. Justice Story of the Supreme Court of the United States while sitting as a circuit judge in the Rhode Island circuit in the

June term of 1827. The first case involving the riparian right doctrine in England was decided in 1849 and referred to *Tyler* v. *Wilkinson* as its authority. My authority for the foregoing statement is an article written by Mr. Samuel C. Wiel of the California Bar, an eminent authority on water law, author of the text "Water Law in the Western States" and various other publications on water law. This article was published in the Harvard Law Review, Volume XXXIII, Number 2, in 1920.

The fallacy underlying the basis for the decision of this court in *Lux* v. *Haggin, supra,* has permeated numerous decisions of this court and is no doubt the reason for much of the confusion which has been brought about as the result of the judicial fumbling and bungling of the water laws of this state (see dissenting opinion in *City of Pasadena* v. *City of Alhambra,* 33 Cal.2d 908, at 938 [207 P.2d 17]).

Returning to the so-called trust title theory of water rights, the majority opinion does not purport to delineate the terms of the so-called trust. But in view of the position taken by the majority that the domestic waters, the title to which is held in trust by the state, must be administered in accordance with the statutory and decisional law of the state, we may assume that such law may be resorted to for the purpose of ascertaining the terms of the trust. If such is [678] the case, it would seem that the terms of such trust may be changed at every session of the Legislature or during every period that a new group of justices constitutes a majority of the Supreme Court of this state. In other words this so-called trust character of the title to the domestic waters of this state, has no stability whatsoever

and may be changed from decade to decade or from year to year as may be dictated by the political fortunes of those who declare and administer it.

The record in this case discloses that in the construction and operation of the units of the Central Valley Project the United States through its Bureau of Reclamation has acquired by purchase and the exercise of the power of eminent domain vast areas of privately owned lands and numerous water rights some of which were based upon filings of applications for the appropriation of unappropriated waters by the State of California and various agencies of the state such as irrigation districts and municipal water districts and also from many private individuals and corporations which claimed to own vested rights in the domestic waters of this state both as appropriators and riparian owners. Included among the agencies from which such rights were acquired by the United States are Madera Irrigation District, Tranquility Irrigation District, James Irrigation District, and the following private or quasi-public corporations; Miller and Lux, Inc., Gravelly Ford Canal Company, Kings River Canal and Irrigation Company, Columbia Canal Company, San Luis Canal Company, Firebaugh Canal Company, Gerlach Live Stock Company, Hollister Land and Canal Company, Chowchilla Farms, Inc., Edison Securities Company and many other corporations and individuals. While the consideration paid by the United States for the rights acquired from the above public agencies, corporations and individuals is not disclosed, it appears, that the sum of $2,450,000 was paid to Miller and Lux, Inc., for title to all of the waters of the San Joaquin

River in excess of flows specified in schedules attached to the agreement of purchase (see Report Prepared Pursuant to Senate Concurrent Resolution Number 48, Legislature of 1951, introduced in evidence as Water Project Authority's Exhibit N.

If the majority is right in holding that the title in all of the water rights acquired by the United States in connection with the construction, development and operation of the Central Valley Project is held in trust for the water users of this state, such holding must be based upon the premise [679] that all of the rights so acquired were held in trust by the owners of such rights who conveyed the same to the United States. This would apply to the vast riparian right holdings of Miller and Lux, Inc., which were adjudicated by numerous decisions of this court as being a part and parcel of the lands of said corporation, title to which was vouchsafed by the due process clauses of both the federal and state Constitutions.

While there can be no question that the Supreme Court of the United States has held in many cases that the matter of ownership, distribution and use of water, with few limited exceptions, is within the jurisdiction of the state and the determination of the right to appropriate and use water is controlled by state law (*Kansas* v. *Colorado*, 206 U.S. 46, 93-94 [27 S.Ct. 655, 51 L.Ed. 956]; *United States* v. *Arizona*, 295 U.S. 174 [55 S.Ct. 666, 79 L.Ed. 1371]; *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 [70 S.Ct. 955, 94 L.Ed. 1231]), recent decisions of that court make it clear that there are certain fields in which the federal law prevails over the state and

that the state's control of the waters within the state is not complete and unqualified (see *United States* v. *San Francisco*, 310 U.S. 16 [60 S.Ct. 749, 84 L.Ed. 1050]; *First Iowa Hydro-Electric Coop.* v. *Federal Power Com.*, 328 U.S. 152 [66 S.Ct. 906, 90 L.Ed. 1143]; *Henry Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369 [50 S.Ct. 140, 74 L.Ed. 483]; *Federal Power Com.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 [74 S.Ct. 487, 98 L.Ed. 666]; *Federal Power Com.* v. *State of Oregon*, 349 U.S. 435 [75 S.Ct. 832, 99 L.Ed. 1215]; *State of Wash. Dept. of Game* v. *Federal Power Com.*, 207 F.2d 391; *Alabama Power Co.* v. *Gulf Power Co.*, 233 F. 606; *California Oregon Power Co.* v. *Superior Court*, 45 Cal.2d 858 [291 P.2d 455]. It seems clear, however, that in the construction and operation of the units of the Central Valley Project the United States proceeded under the provisions of the Reclamation Act (43 U.S.C., § 731 et seq.) and with full recognition of the water rights there involved having valid existence under state law (*United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 [70 S.Ct. 955, 94 L.Ed. 1231]).

It is a matter of common knowledge that there are thousands, probably millions of acres of land in California which are still in government ownership and vast water resources exist in these regions. As I read the recent decisions of the Supreme Court of the United States, I have little doubt that under the rules of law announced therein, the federal govern- [680] ment may lawfully exercise exclusive control over the water resources which exist on lands and in areas owned and controlled by it. I refer to the national forests and the undeveloped areas of

this state which remain almost exclusively in government ownership and control.

We may take judicial notice that the federal government is now engaged in the construction of another large reclamation project which will be annexed to and contribute to the water resources of the Central Valley Project. I refer to the Trinity River Project which contemplates the construction of a dam 465 feet high on the Trinity River near Weaverville in Trinity County, which will impound the run-off of the Trinity River watershed and will have a capacity of approximately 2,500,000 acre feet of storage. More than 75 per cent of the 450,000 acres of land embraced within this project is owned by the United States government. When this dam is completed and the water therefrom discharged into the Sacramento River basin, the United States government will no doubt proceed to dispose of it in accordance with the laws of the United States including the 160-acre limitation in the Reclamation Act. It does not seem reasonable and logical to me that this court should say to the government of the United States that you cannot impound the waters of the Trinity River basin which are now running to waste and causing immeasurable flood damage, and divert it into areas where it may be used for the irrigation and improvement of arid lands and other useful purposes unless you eliminate from your contracts for the distribution of this water the 160-acre limitation which the Congress of the United States has said must be included in such contracts. Yet, this requirement must flow from the holding of the majority here even though the water made available by said project is produced from a drainage basin, 75 per cent of the area of which is owned by the United States.

It is my view that when the United States constructs a reclamation project by impounding water in compliance with both state and federal laws, it is the owner of that water and may dispose of it as provided by federal law, and it may exact any condition which the federal law sees fit to provide for in connection with the sale and distribution of that water. Of course this does not mean that Congress could impose restrictions in conflict with constitutional principles. It may be that the State of California by legislative action could so restrict the appropriation of its water resources that the federal government would not see fit to develop further reclama- [661] tion projects in this state, but so long as the federal government complies with the law of the State of California in the construction, operation and maintenance of its reclamation projects, I am disposed to hold that it may sell and distribute the water developed by said projects under contracts of the type here involved which, in my opinion, do not violate any provision of the Constitution and laws of this state or the Constitution and laws of the United States.

We have here no controversy between the State of California and the United States. The attorney general of California takes the position that the contracts here involved are valid. The agencies here involved have all accepted and approved these contracts both by their governing boards and the inhabitants of the districts affected thereby. The validity of these contracts is challenged only by individuals who claim that their property rights will be affected thereby. I do not agree.

At the outset of this opinion I stated that the majority opinion is based upon two fundamental misconceptions. I

then called attention to the fact that the majority opinion is written upon the assumption that this is a case involving water rights and that the State of California holds title to all of the domestic waters of the state in trust. I think it proper to add another fundamental misconception on which the majority opinion is based; that is, that the so-called 160-acre limitation is in effect an excess land law. With this concept I do not agree. In an excellent article by Professor Paul S. Taylor, Professor of Economics, University of California, printed in the Yale Law Journal, Volume 64, Number 4, February, 1955, entitled "*The Excess Land Law: Execution of a Public Policy*," he states in part:

"A great confusion pervades discussion of the excess land law and threatens disaster to public policy regarding disposing of public domain. Congress has declared this policy to be the widespread distribution of benefits and the curbing of monopoly and speculation, whether the domain is in form of land, water, or both. The excess land provision of the National Reclamation Act of 1902 is a means of attaining these ends in the public disposal of water.

"General and legal acceptance have joined to confer authority upon either of two descriptive titles—'excess land law' or '160-acre limitation'—both of them equally deceptive. The law is not really a *land* law, and it places no limitation whatsoever upon the *acreage* a man may own. The restraint is neither upon acreage of land nor upon water, but upon the [682] *individual*. No individual is entitled to receive more than an equitable share of the water distributed under reclamation law. The maximum *indi-*

vidual share is set at an amount of water necessary to irrigate 160 acres of land.

"Among the sources of this confusion of language, two are 'accidents'—one physical, the other historical. The first is the unequal geographical distribution of water. Water and land are two halves of a productive whole everywhere. East of the one hundredth meridian nature has joined them, and any description or analysis of agricultural land can assume water. West of the hundredth meridian water and land are separate. Man-made works—reservoirs and canals—are required to join them. Water and land, therefore, must be treated separately, whether as physical entities, objects of private ownership, or the concern of public policy. Water cannot be assumed as the natural, inevitable and permanent adjunct of land. *Land* ownership does not equal *water* ownership west of the hundredth meridian.

"The second source of confusion is an historical accident. Policy was debated and formulated in the nineteenth century when settlement was still east of the hundredth meridian, and water was not a concern. The great legislative landmarks in the nation's policy favoring actual settlers are land laws—the Pre-emption Act of 1841 and the Homestead Act of 1862. After these acts were passed, settlement crossed the hundredth meridian, and water became the primary concern. General policy was not altered with the movement to the arid belt, but the techniques and devices for implementing it had to change. The artificial union of land and water required more complex thought and language than was necessary where land and water are joined naturally. The means of applying public

policy to water had to be declared separately, spelled out in new terms. Chief among the new techniques was the excess land law.

"It took something of a mental wrench to turn American lawmakers and administrators from land policy to water policy. The natural tendency was to carry over the language of earlier land problems to the more complex problems of water. A result of this inertia has been confusion in thought as well as in language west of the hundredth meridian, where thinking in terms of land policy overemphasizes land and underemphasizes water. Some persons have found it advantageous to exploit the confusion. Those who achieved what Major Powell called 'monopoly of land' utilize this habit of thinking in terms of *land* policy to confuse the public, to [683] suggest that private landowners have a moral claim to water in proportion to their landholdings whatever their size, and to defeat the efforts of legislators who seek equitable distribution of water among individuals. Even administrators do not find it easy to remember that the essential question is not, who owns the land, but who gets the water.

"The fact of importance above all others in federal reclamation is that the landowner calls upon the government to provide him with water. It is for Congress representing the general interest, and not for the landowner, to say upon what terms, in what amount, and in accord with what policy the public will supply water. This is a first principle inherent in a relationship between the public that gives and an individual who receives. The concern of the law is to distribute water equitably among individual landowners, not—except below 160 acres—in proportion to

their holdings of land. This principle is accepted without question by most landholders seeking water under reclamation law; the few who object usually are holders of excess land.

I am in full accord with the views expressed by Professor Taylor and commend the reading of his article in full by those who are interested in this subject.

Since the majority opinion is based upon the wholly unsound and unsupported assumption that the title to the water rights acquired by the United States in the construction, development and operation of the Central Valley Project are held in trust for the use and benefit of the water users of California and that the title to such rights is therefore restricted to the extent that the United States may not dispose of such water pursuant to the Reclamation Act of 1902 and acts amendatory thereto containing the so-called 160-acre limitation, it follows that the conclusion reached by the majority that the contract here involved deprives certain landowners within the plaintiff irrigation district of vested rights without due process of law and without just compensation is equally unsound and unsupported.

For the reasons hereinabove stated I would reverse the judgment. [684]

Appendix A-2

In The Superior Court of the State of California,
In and for the County of Tulare

No. 39627

The Ivanhoe Irrigation District, an Irrigation District,

Plaintiff,

vs.

All Parties and Persons having or Claiming to Have Any Interest in the Approval and Confirmation of the Proceedings for the Organization of the Ivanhoe Irrigation District, et al.,

Defendants.

MEMORANDUM OF DECISION AND ORDER FOR FINDINGS*

In this action the court is asked to determine the validity of a contract for the delivery of water by the United States from the Central Valley Project to the Ivanhoe Irrigation District. The contract is dated the 23rd day of September, 1949, and a copy of it is attached to this memorandum.

The Ivanhoe District has instituted the action in accordance with the provisions of Section 23225 of the Water

*Unreported. Clerk's Transcript pp. 204-225.

Code of California, which section authorizes such a proceeding. The complaint names a multitude of defendants all of whom are designated either by virtue of ownership of property in the district, or on account of an interest in the contract, or interest in the organization of the district. All of the defendants have defaulted except the State of California, the Water Project Authority, the State Engineer, and Courtney McCracken, a landowner in the district.

By Section 22671 of the Water Code the action is declared to be one in rem, (Frenchman-Cambridge Irr. Dist., 46 N.W. 2d 692, ... Nebr. .....) which is to say the decree will fix the status of all property within the district with respect to the contract, foreclosing all inquiry in this respect in any future proceeding and be binding on all the world. (Sec. 1908 C.C.P.; Becker v. Contoure Laboratories, 279 U.S. 388, 495 S. Ct. 356; Riley v. New York Trust Co., 315 U.S. 343, 62 S. Ct. 608)

Generally, there are four classes of persons sued. One group comprises "All parties and persons having or claiming any right, title or interest in or lien or claim upon or against . . . all *real property* within said district." (In all instances where emphasis is added it is by this court unless otherwise indicated)

Another group is composed of "All parties and persons having or claiming any right, title or interest in or lien or claim upon or against *the property* within said district, or any thereof."

The third group consists of "All parties and persons in any way interested in the certain contract dated September 23, 1949, entitled, 'Contract between the United States

and the Ivanhoe Irrigation District providing for water service and for the construction of a distribution system', made by and between the United States of America and the said Ivanhoe Irrigation District, the execution of which was authorized at an election held in said district on August 23, 1947, and the proceedings leading up to and including the execution and delivery of said contract."

The fourth group is made up of "All parties and persons having or claiming to have any interest in the approval and confirmation of the proceedings for the organization of the Ivanhoe Irrigation District."

The identity and the number of persons over whom the court has been given jurisdiction and whose property will be bound by the in rem judgment is indicated by the sections of the Civil Code defining what is meant by property and real property.

Property is defined to be anything of which there may be ownership. (Sec. 654 Civil Code) It may be either real or personal. (Civil Code Sec. 657)

"Real or immovable property consists of:

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;
4. That which is immovable by law . . ." (Sec. 658 Civil Code.)

Furthermore, "*All property has an owner,* whether that owner is the state, and the property public, or the owner an individual, and the property private." The state may also hold property "as a private proprietor." (Sec. 669

Civil Code; See also 21 Cal. Jur. 641 and 23 Cal. Jur. 541) The title to property is never suspended but always vests in someone.

An appurtenance is defined to be a thing which is incidental or appurtenant to land when it is by right used with the land for its benefit, (Sec. 662 Civil Code) and the right to the use of water upon land for its benefit is an appurtenance and is a part of the land upon which it is so used. Appurtenance to land is a form of real property.

By virtue of his ownership of real property within the district the defendant, McCracken, has answered the charge of the complaint asking that his property rights as against the contract be declared. The State of California, the Water Project Authority and the State Engineer have answered as parties interested in the contract, and point to the Water Code and the Constitution of California as the source of their interest.

The Secretary of the Interior is charged with the administration of the Reclamation Laws of the United States, and it would appear under the holding of the Supreme Court in Ickes v. Fox, 300 U.S. 82, 81 L ed 525, that he too is a person interested in the contract before the court, and, as such, will be bound by the decree to be entered herein. The case of Ickes v. Fox was an action brought to enjoin the Secretary of Interior from enforcing an order, the wrongful effect of which would have been to deprive respondents of vested property rights. The court there held that on account of the injury threatened to the vested rights of the respondents, who were the owners of lands in an irrigation district, the Secretary of the Interior could not claim immunity from the injunc-

tive process but was as liable for his unlawful acts as any other person. That case rested in the main upon an abuse of governmental power, which is one of the affirmative defenses of Courtney McCracken in this case. The Secretary, so it would appear, is a party to this action, and his default has been regularly entered along with that of all other persons identified with the administration of the Reclamation Laws.

The State of California is appearing in its sovereign capacity, and as parens patriae for the protection of its citizens and the protection of the property of the landowners and water users in the district. The only claim made by the State to the Project water is on behalf of its agencies, the Central Valley Project and the Ivanhoe Irrigation District in their trust capacities.

The Central Valley Project Act of 1933 (Stats. 1933, Ch. 1042) was passed by the 1933 session of the California Legislature, and approved by the People of California at a referendum election held December 19, 1933. By this Act the Water Project Authority, a Board comprised of five members, was created to construct the impounding and distributing works and to operate and administer the project. This power is still vested in the Authority under the law of this State, (Sections 11550-11567 Water Code) and gives it a definite interest in the contract.

The State Engineer is Chief of the Division of Water Resources of the Department of Public Works of California, (Secs. 200, 201, Water Code) and Executive Officer of the Water Project Authority. (Sec. 11411 Water Code) Section 275 of the Water Code requires him to "take all appropriate proceedings or actions before executive, legis-

lative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this State." And by the terms of Section 1052 of the Water Code, "The diversion or use of water . . . . other than as authorized" by that code is made a trespass and as such may be enjoined. In obedience to the legislative mandate imposed upon him the State Engineer has appeared to protect the water resources of the State, and it would seem to enjoin an unauthorized use thereof.

In the case of United States v. Gerlach Livestock Co., 339 U. S. 725, 70 S. Ct. 955, 94 L ed 1231, the entire Central Valley Project was before the court for consideration. The case arose out of a dispute between the Federal Government and the livestock company over certain vested water rights along the lower San Joaquin River. The government took the position that it need not pay for these rights which had been destroyed by impounding the flow of the San Joaquin behind the Friant Dam on the theory that the impounding was in aid of navigation. The landowner went to the Court of Claims and was awarded compensation for the loss of its rights and the government appealed. The opinion affirming the Court of Claims was handed down on June 5th, 1950, a date subsequent to the contract offered here for validation. Thus we have the latest expression of the Supreme Court of the United States with respect to the relation of the United States, and particularly the Bureau of Reclamation, to the Central Valley Project and with respect to the rights of the landowners within the Project.

The court in that case held that "the laws of the State . . . determine the rights and liabilities of landowners

and appropriator" as the Federal Reclamation Act provides. The Reclamation Act to which the court adverted is the Reclamation Act of 1902, 32 Stat. 388, Ch. 1093, as amended, 43 U.S.C.A. Sec. 371 et seq; F.C.A. title 43, Sec. 371 et seq. Section 8 of this Act provides: "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the *laws* of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or *any vested right* acquired *thereunder* and the Secretary of Interior, in carrying out the provisions of this Act *shall proceed in conformity* with *such laws,* and nothing herein shall in any way affect any right of any state or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

In referring to the several Acts of Congress authorizing the construction of the irrigation works of the Central Valley Project by the Reclamation Bureau the court further said in the Gerlach case that, "Congress proceeded on the basis of full recognition of water rights having valid existence under state law. By its command that the provisions of the reclamation law should govern the construction, operation and maintenance of the several construction projects, Congress directed the Secretary of Interior to proceed in conformity with state laws, giving full recognition to every right vested under these laws. Cf. Nebraska v. Wyoming, 295 U. S. 40, 43, 79 L ed 1289, 1291, 55 S Ct. 568; California Oregon Power Co. v. Beaver

Portland Cement Co., 295 U. S. 142, 169, 79 L ed 1356, 1364, 55 S Ct. 725; Nebraska v. Wyoming, 325 U. S. 589, 614, 89 L ed 1815, 1829, 1830, 65 S Ct 1332; Silas Mason Co. v. Tax Com. 302 U. S. 186, 82 L ed 187, 58 S Ct. 233 ... We think it clear that throughout the conception, enactment and subsequent administration of the plan *Congress has recognized the property status of water rights vested under California law.*" There is no escape from the conclusion that in so far as the Central Valley Project is concerned whenever there is a conflict between the Federal Reclamation laws and the laws of the State, the law of California must prevail.

The governing water law of California is "now derived from a 1928 amendment to its Constitution . . ." (Art. 14 Sec. 3) ". . . . to which," as the Supreme Court has said in the Gerlach case, "the Federal Reclamation Act defers."

Although the Secretary of Interior is charged with the administration of the Federal Reclamation laws, as the same apply to the Central Valley Project, nevertheless he has a mandate, as the Supreme Court has said, to yield to the laws of California in "the control, appropriation, use," and, "distribution" of "Project Water" (U. S. Reclamation Act, 1902, Sec. 8) The California Water Code places the administration of these matters in the hands of the State Engineer, and it is a province which the Secretary of Interior is, by Congressional mandate, forbidden to invade.

By the Water Code the Engineer is empowered to incorporate reasonable restrictions and conditions in all permits and licenses issued by the Department of Natural

Resources for the use of the unappropriated waters of the State, but in doing so he must recognize the right of the Federal Government to have repaid to it the public moneys spent in the construction of the Diversion, storage and distribution works. Restrictions or conditions designed by him to defeat this end would be void.

The vested right, which the defendant McCracken contends will be destroyed if the contract is validated, is an appropriative right. It is based on filings made by the Director of Finance of the State of California on the waters of the Sacramento and San Joaquin Rivers for the benefit of the Central Valley Project, and it vested as of the date of these filings. The character of this right can be best understood by a brief review of the history of the Project.

In 1927 the Director of Finance of California filed thirty-seven applications with the State Division of Water Rights for permits to appropriate all of the unappropriated waters in the watershed of the entire Central Valley Project. These filings were for the dual purpose of irrigation and generation of power. The acreage of land proposed to be served for irrigation under the filings totals 6,750,000 acres, with an over all storage of 18,196,000 acre feet of water. Of the acreage to be so served, 2,500,000 acres lie in the Sacramento and San Joaquin Valleys—the Ivanhoe Irrigation District being located in the valley of the San Joaquin. The filings were made on the Sacramento River at the site of the Shasta Dam and on the San Joaquin River at the Friant Dam site. The filings are numbered 5625, 5626, 5637, and 5638 on the records of the Division of Water Resources of the State of California.

Subsequently, and in August of the following year additional filings, Nos. 9364 and 9365 on the Sacramento, and 9369 on the San Joaquin, were made. The filings on these two rivers approximately fifteen per cent of the total of the 18,136,000 acre feet filed on. On the 3rd day of September, 1938, the Director of Finance of the State assigned the filings on the Sacramento to the United States in trust "for the use and benefit of the Central Valley Project", and on September 30, 1939, he made a like assignment in trust of the filings on the San Joaquin.

The San Joaquin River has its source in the southern Sierra Nevada mountains east of Fresno, and, after it reaches the valley, flows generally in a northwesterly direction to a confluence with the Sacramento in the delta region at the upper end of Suisun Bay, which is part of the ocean. The Sacramento, on the other hand, heads in the Siskiyous at the extreme northern end of the State. The Pitt heads in the most northern of the Sierras and combines its flow with that of the Sacramento at a point above the Shasta Dam. From there the Sacramento wends southeasterly to join the San Joaquin. Of the acreage in the two valleys about three-fifths lies in the San Joaquin. On the other hand about two-thirds of the water production of the area comes from the Sacramento River. By the construction of the authorized system of works the excess and unneeded water of the Sacramento would be transported into the valley of the San Joaquin and distributed there to supply its deficiency.

To effect the projected distribution, Friant Dam was constructed to impound and divert the flow of the San Joaquin through the Madera Canal northerly and the

Friant-Kern Canal southerly along the easterly side of the valley, while the releases from the Shasta Dam were to be brought through the Cross-Delta Canal to the Tracy pumping plant and hoisted into the Mendota Canal to replace the waters of the San Joaquin impounded behind Friant Dam, and for use on the west side of the San Joaquin Valley. In this manner the excess water of the Sacramento would be put to a beneficial use instead of flowing into the ocean. The immediate supply of the Project water now being delivered to the Ivanhoe District comes directly from the Friant-Kern Canal.

Upon the Central Valley Project Act becoming effective in January, 1934, the Water Project Authority immediately set about to construct the Project. Additional studies were made and detailed plans prepared. In addition to State appropriations, funds were obtained from the Federal Government under its assistance programs and work commenced on both the Shasta and Friant Dams.

The first assistance contract by the Water Project Authority with the Federal Government was made on March 25th, 1936, under the Emergency Relief Appropriation Act of 1935. This contract recites that: "In order for the accomplishment of the early construction and operation of the Project in the most expeditious and economical manner, the Bureau of Reclamation and the Water Project Authority shall cooperate fully with each other in attaining such end", and that "It is contemplated that at the earliest practicable date a contract will be entered into between the United States and the Water Project Authority providing for . . . .

(a) The operation and maintenance *by the Authority* of useful units of the Project, upon presenting assurances of payment satisfactory to the United States of the cost thereof;

(b) Appropriate payment *by the Authority* to the United States for expenditures in construction of the Project;

(c) The securing *by the Authority* of the appropriate contracts for disposal of facilities to be made available by the Project."

Contracts of similar import were made with the Federal Government on the 13th day of March, 1937; the 8th day of November 1937; and the 30th day of June 1939.

In 1940 Congress passed an act providing, "That the entire Central Valley Project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized . . ." thus giving Congressional sanction to the Federal assistance already given the Water Project Authority. This act also authorized the Project as a Federal undertaking. Up to this point there had been six years of development by the Water Project Authority and thirteen years of development since the filings were made on the Sacramento and the San Joaquin for the benefit of the Project. The Project being of no mean magnitude, the time consumed in development and construction is not at all disproportionate to the undertaking.

It has been recognized as the rule in California from the days of the early miners (See United States v. Gerlach,

As in the Ivanhoe contract the United States undertook to deliver water for irrigation purposes from the Central Valley Project to the district and to expend funds for the construction of a distribution system within the district. This proceeding, also an *in rem* special proceeding to obtain the confirmation of the proposed contract, was brought by the district pursuant to the provisions of sections 22670 et seq. and section 23223 of the Water Code. The federal law (Omnibus Adjustment Act of 1926, § 46, 44 Stats. 649, 650, 43 U.S.C. § 423e, Federal Reclamation Laws Ann. 318-319) and article 36 of the contract require the validity or invalidity thereof to be determined by a court of competent [687] jurisdiction. The contract in question was entered into on May 14, 1951, by the district acting under the Irrigation District Federal Cooperation Law. (Wat. Code, §§23175 et seq.) On the 26th of March, 1951, the California Districts Securities Commission, with reservations, approved the contract (Wat. Code, §§23222, 24253), and the electors of the district subsequently approved it by a vote of 1979 to 755 (Wat. Code, §§23220, 23221, 21925-21935). The district commenced this proceeding on the 21st day of May, 1951. Eighty-six landowners within the district, and four landowners outside of the district filed answers in which they opposed the confirmation of the contract. The State of California and the Water Project Authority of the State of California, by and through the attorney general, filed a joint answer. The state prayed that the contract be validated and a separate prayer recited that the Water Project Authority "is not taking any position upon the validity of the contract" and requested the court to declare that its decree "does not purport to

etc., supra) that an appropriate water right vests as of the date of filing regardless of whether the filing was signified by the commencement of construction of diversion works, the posting of a notice, or making application to the Division of Water Resources for the right to divert and use the water. This rule was applied in the leading California case of Inyo Consolidated Water Co. v. Jess, 161 Cal. 516, where one George Chaffey, in 1905, posted and recorded five notices of appropriation of the waters of Cottonwood Creek in Inyo County. An appropriation of water at that time was intiated by posting and recording a notice pursuant to the provisions of section 1416 of the Civil Code as it then stood. Chaffey transferred all rights that he had acquired by posting the notices to the Inyo Consolidated Water Company. The company then filed suit under Section 738 of the Code of Civil Procedure to extinguish all claims in conflict with the water rights, which it had acquired from Chaffey.

The defendants contended that any right growing out of the posting was not a vested right, *was not* property, and could not be protected in an action to determine conflicting property claims under the quiet title statute. The court held adversely to this contention stating, "Thus (by posting and recording the notice) there is given that which did not exist before (*Kelley v. Natoma Water Co.*, 6 Cal. 105), a constructive right to the use of water, a right existing only by publicly declared intent, and which may be made a perfect and complete title, as against all except prior users and riparian owners, by beginning the work within sixty days, diligently prosecuting to completion, and there upon

be an adjudication of the right or interest of the State of California or its agencies . . . or of the right or interest of the United States or its agencies . . . in or to the water or water rights . . . involved in the Central Valley Project."

After the statutory time for filing an answer had expired, leave of the court was granted the State Engineer of the State of California, acting in his capacity as such and ex-officio as Chief of the Division of Water Resources, Department of Public Works, to file a separate answer by counsel for the Division of Water Resources. The State Engineer took no position as to the validity of the contract, stating that his object was to protect the state law relating to water use and control. Regional counsel for the Bureau of Reclamation of the Department of the Interior were granted leave by the court to appear as amici curiae and as such participated throughout the proceedings in the trial court in support of the confirmation of the contract.

Judgment was ordered in favor of the objecting defendants and the court specifically directed that findings of fact and conclusions of law be prepared in accordance with the views of the same court in the Ivanhoe case. However, additional findings and conclusions hereinafter referred to were made on issues not involved in the Ivanhoe case. The judgment included injunctive provisions similar to those in the Ivanhoe case except that it expressly provided that "The delivery of water by the United States to the plaintiff District at charges not to exceed $3.50 per acre foot for Class 1 water and $1.50 [688] per acre foot for Class 2 water, and the collection of funds therefor, and the payment, for the costs thereof by plaintiff district to the United States is not enjoined."

actually using the water. This incomplete right, *is an interest in the reality.*" So it was held that the incipient right acquired by the filing became vested in the appropriator, was transferable, and would support an action to quiet title.

Prior to the provision of the code requiring that a notice be posted and recorded, appropriation was made by actually diverting the water from the stream. The appropriative right vested and became appurtenant to the land to be supplied when the work of diversion was commenced. With respect to this right the court in the Inyo case said: "There is no case, arising prior to the enactment of the code, which holds that the party who thus in good faith *began* and diligently prosecuted the *work* on a dam and ditch for the diversion and use of water, could not protect his incipient right to the water, against the hostile diversions and claims of others, by an appropriate suit for that purpose. It is obvious that this could not be so. Such visible act and avowed intent gave him a conditional right to the future use of the water, prior to its actual use, the condition being that he should thereafter diligently continue the work to completion and then divert the water and apply it to a useful purpose, *failing* which *his right* would cease. Upon the performance of these conditions, his *title* to such use would become *complete* and *perfect*. In the meantime, however, he had an existing conditional right, manifested by actual visible possession of the works. It would be clearly a property right, and it being incidental and appurtenant to land, it was *real property*."

The provisions of the Civil Code requiring the posting and recording of a notice to initiate an appropriative

The appellants are the State of California represented by the attorney general who seeks a reversal of the judgment, the plaintiff district which seeks a reversal, and the State Engineer as Chief of the Division of Water Resources of the Department of Public Works who asserts the invalidity of the contract but contends that the trial court erred in a determination that a right to the use of water is acquired by duly filing an application to appropriate water without perfecting it. The respondents, who seek an affirmance of the judgment, are supported by the Di Giorgio Fruit Corporation as amicus curiae. The Ventura County Flood Control District has appeared as amicus curiae in support of the appellants and seeks to establish that the trial court's determination that water rights involved have become appurtenant to the lands upon which water is being or is to be used is not in accordance with existing law.

The Madera Irrigation District is located in Madera County. It now has an area of approximately 112,000 acres, of which about 85,000 acres have been developed for irrigation. Before project water became available 90 per cent of the acreage irrigated was supplied with water pumped from an underground water supply. During the 25-year period from 1922 through 1946 the demand on that supply exceeded the natural supply by an average of 27,200 acre feet annually and resulted in a net lowering of the water table by 21.7 feet. The need of a supplemental supply of water was thus apparent. Shortly after its organization the district in 1920 developed preliminary plans for the construction of a storage dam on the San Joaquin River near Friant and a canal to deliver water stored

water right have been superseded by the provisions of the Water Code of California requiring an application to appropriate to be made to the Division of Water Resources. In *Yuba River Power Company v. Nevada Irrigation District,* 207 Cal. 521, the Supreme Court of California has held that the filing of such an application creates the same kind of a water right as was obtained by the commencement of diversion prior to the code enactment and such as vested by posting and recording a notice under the code section relied on in the Inyo case. As the court there stated, "It would be clearly a property right, and it being incidental and appurtenant to land, *it was real property.*"

Where the right has been initiated by one individual for use upon lands owned by another in a district or community, no different rule obtains. Such a situation existed in the case of *Byington v. Sacramento Valley West Side Canal Company,* 170 Cal. 124. The court there held upon the authority of *Inyo Consolidated Water Company v. Jess,* 161 Cal. 520, "that one" in such a situation "may protect his incipient right to water against hostile invasions and claims of others. And it is there said, "the same doctrine is announced in the later case of *Merritt v. City of Los Angeles,* 162 Cal. 50."

The development history of the Project shows that McCracken is vested with more than the incipient right dealt with in the Inyo case. The construction of the diversion works has been completed and the Project water is now being delivered to the Ivanhoe District for distribution to his lands, and the contract here offered for validation is the only barrier which prevents his lands from receiving their proportionate share of the Project water.

therein to lands within the district. It acquired a suitable dam site and gravel needed in the construction. It filed applications with the Division of Water Resources to appropriate unappropriated water of the San Joaquin River. Plans for construction of the dam were never completed by the district apparently because litigation between Miller and Lux and the Madera Irrigation District established that there was insufficient unappropriated water in the San Joaquin River to sustain the proposed project.

In May, 1939, the district entered into a contract with the United States whereby it transferred its dam site, gravel lands and applications to the United States for use in connection with the Central Valley Project. In exchange the [689] district received $300,000 and a permanent priority right to contract for an annual supply of water from the project. Part A of the contract now under consideration is in partial recognition of that right.

The contract in Part A provides for a designated water supply for the district from the Friant Dam and the Madera Canal for a period of 40 years, commencing with the year in which the initial delivery date occurs. The United States agrees to furnish to the district, and the district agrees to accept and pay for the water supplied at rates whose maximum limits are fixed by the contract. Part B of the contract provides that, to the extent that funds may be available by appropriation, the United States will construct a distribution system to cost not exceeding $8,320,000. The system will be constructed so as to provide facilities for the delivery of water from the Madera Canal to each unit of irrigable land within the district, each unit in no event to comprise more than 160 acres of land. The

Under the law of California the Ivanhoe Irrigation District is McCracken's trustee limited in its trust to receive and distribute the Project water to him. See *Merchants Bank v. Escondido Irrigation District,* 144 Cal. 329; *Tulare Irrigation District v. Collins,* 154 Cal. 440, 442; *Hall v. Superior Court,* 198 Cal. 373, 383; *Lindsay-Strathmore Irrigation District v. Wutchumna Water Company,* 111 C. A. 688, 698; *Allen v. Hussey,* 101 C. A. 2d 457, 467. In *Merchants Bank v. Escondido Irrigation District,* supra, it is said that, "The state, indeed, has a large, though not an unlimited power of disposition over the property of ordinary municipalities; which is commonly held in trust for the public generally, or for the limited public of the municipality. (*Cooley on Constitutional Limitations,* 342 et seq.; *I Dillon on Municipal Corporations,* secs. 27, 66, 67.) But here, the corporation in question is distinguished from ordinary municipal corporations by the fact that 'the *legal title*', only of the property of the corporation is vested in the district, 'in trust for the uses and purposes set forth in (the) act'; *and that the beneficiaries of the trust*—who, upon *familiar equitable principles, are to be regarded as the owners of the property—are the landowners in the district with whose funds the property has been acquired* (Civ. Code sec. 853); and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches, and property generally, as the means of supplying water. (Stats. 1887, pp. 34, 35, secs. 11, 13). Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of the provisions of

Section 13 of Article I of the state constitution—that 'no person shall be . . . deprived of . . . property without due process of law', and of the similar provision of Section 1 of the Fourteenth Amendment to the constitution of the United States.''

Any provision of the contract in violation of the trust is void. See *Allen v. Hussey,* 101 C. A. 2d 457, 472, where it is held that, ''An irrigation district . . . has only such powers as are given to it by the Legislature'', ''and all contracts or purported contracts of the district which are beyond the scope of the power given by statute are void'', citing *Bottoms v. Madera Irrigation District,* 74 Cal. App. 681, where at page 702 of the opinion the court states that ''The wisdom of the agreement has nothing whatever to do with its ultra vires character. If the agreement procured is not one authorized by the Irrigation Act, it is illegal, even though there is no taint or color of moral wrong.'' And in *Colburn v. Wilson,* 23 Idaho, 337, 130 Pac. 381, it is said that, ''A contract by the Board of Directors of such a district, giving to others the management or control of any part of the system, and taking that management and control out of the hands of the district Board, would be ultra vires and void.'' The Water Code, Section 22250, expressly requires the Ivanhoe District to distribute to McCracken of the Project water received by it that proportion which the last assessment of the district against his land bears to the whole sum assessed in the district for district purposes. The title to this quantity of water is vested in McCracken under the law of the State, and so long as his assessments are paid and the water is being put to a beneficial use, the district may not interfere with his right.

No valid reason is advanced and no authority is cited to support the theory that the Central Valley Project does not bear the same trust relation to its landowners as an irrigation district. The filings made by the Director of Finance on the waters of the Sacramento and San Joaquin Rivers were in furtherance of the Central Valley Project, and with the avowed object of divorcing the State from its sovereign title in those waters. The severance having been effected, the title vested in the owners of the lands to be benefited. *(Inyo Consolidated Water Co. v. Jess,* Supra). The Director of Finance became seized with the naked title only, the beneficial ownership of the right to use the water so filed upon passing to the owners of the land upon which it was intended to be used. This beneficial ownership could fail only if the project were abandoned.

The grants by the Director of Finance to the United States of the rights acquired under the applications could convey no more by way of right or title than was held by him. The title acquired by the United States could reach no higher than its source. The language of the instruments of conveyance indicates that the existence of a trust in the Director of Finance was recognized and that the transfer was intended to be subject to this trust. The words of limitation in each conveyance are "for the use and benefit of the Central Valley Project, California."

The Federal Government by acceptance of the stewardship passed on to it by the Director of Finance of California, recognized the right of McCracken, and the other landowners in the Project, to have the waters of the two rivers applied to their lands in accordance with laws of this State as such laws stood at the time these rights accrued. The

and particularly whether the district and its landowners have additional rights arising from the district's applications for the appropriation of water on the San Joaquin River at the time it contemplated construction of a dam at Friant. The applications, filed in the 1920's, were never perfected; no works pursuant thereto were ever built, no water was ever diverted, and no permit or license was ever obtained.

As a part of its judgment the trial court in several instances held that an application for the appropriation of unappropriated water from a particular source resulted in a vested right in the applicants to a permanent supply of water from that source. In the Ivanhoe case it was con- [691] cluded that the rights acquired under an application by the state or its assignee or by the United States to appropriate the domestic waters of the state for a beneficial use did not confer a vested right in the persons for whose benefit the application was made in the sense that such right became a part and parcel of the freehold estate. It is contended by the State Engineer in the present case that the right created by the application itself is an incomplete, incipient and conditional right in and to the water applied for. With this contention we agree.

Prior to legislation upon the subject, no priority of right to the use of water could be acquired in advance of the taking of the first definite step to divert water to beneficial use. When work was finally completed and the water applied to beneficial use, a right vested in and to the use of the water which "related back" for priority to the time when the claim was made, the location was selected, and work was commenced looking toward the conveyance of a

Government cannot now urge upon this court through the medium of a contract that the rights so vested should be destroyed by judicial decree. Such would be the effect of breathing validity into the excess lands provisions of the contract. And this, the court cannot do under the laws and the constitutions of the State and United States. These provisions of the contract must, therefore, be found invalid.

Another statement of the Supreme Court made with respect to the Central Valley Project in *United States v. Gerlach, etc.,* supra may with propriety be repeated here. The statement is that: "By directing the Secretary to proceed under the Reclamation Act of 1902, *Congress elected* not 'to in any way interfere with the laws of any State . . . relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder'." As the water rights involved in this case had vested, the court required that compensation be paid for their destruction. See Constitution of the United States, Fifth Amendment and Fourteenth Amendment, Section 1; also Constitution of California, Article I, Sections 1, 13 and 14. These are the due process provisions of the respective Constitutions and are so familiar to every one that they need no exposition. Suffice it to say that in the instant case no compensation for the threatened destruction of McCracken's vested rights has been offered, and it may be assumed that none is intended.

It is McCracken's right to receive his share of Project water upon all of his lands regardless of acreage as that share is denied by the Irrigation laws of this State, and it is the right of the Federal Government to be reimbursed

definite amount of water from a definite source to the place of its intended use. (*Nevada etc. Co.* v. *Kidd*, 37 Cal. 282; *Osgood* v. *El Dorado Water & Mining Co.*, 56 Cal. 571.) From the time of the commencement of the work to the time of beneficial use the right was considered as incipient and conditional. The provisions of the Civil Code enacted in 1872 were substantially declaratory of the rules laid down in the early decisions. (Civ. Code, §§1414-1421.) In *Inyo Consol. Water Co. v. Jess*, 161 Cal. 516, the court declared at page 520 [119 P. 934] that the purpose of the code sections was "to afford a more perfect protection for such rights and to facilitate the subsequent acquisition of the title to the use. Previously, the incomplete right could be acquired only by some open, visible work to that end, upon the ground, accompanied by a declaration of the intent. Disputes would naturally arise as to priority between different diversions from the same stream at places far apart. The code endeavors to avoid this by providing for the posting of a notice at the proposed dam, and declaring that such notice secures a prior right, without any work, for the period of 60 days thereafter. (*Wells* v. *Mantes*, 99 Cal. 586 [34 P. 324].) Thus there is given that which it is said did not exist before (*Kelly* v. *Natoma Water Co.*, 6 Cal. 105), a constructive right to the use of water, a right existing only by publicly declared intent, and which may be made a perfect and complete title, as against all except prior users and riparian owners, by beginning the work within sixty days, diligently prosecuting it to completion, and there- [692] upon actually using the water. This incomplete right, although not as yet a title, is an interest in the realty." (See also *Merritt* v. *City of Los Angeles*, 162 Cal. 47 [120 P. 1064].)

for the expenditures which it has made in constructing the irrigation works and for its actual cost of transporting the water. Under the Reclamation Law the repayment of the construction charges may be spread over a forty year period, and that is the terms of the contract before the court. Since the contract was executed by the government it is to be presumed that the payments therein provided for have been correctly computed and cover the charges to which the government is entitled. Nowhere, in either state or federal law, is there any provision for a series of repayment contracts, and it must be presumed that the contract here executed by the United States is the repayment contract to which it is entitled under the Reclamation Act. The Government is never the owner of water for sale under any reclamation project, (*Ickes v. Fox* and *Nebraska v. Wyoming*, supra) and much less here, where it is by express agreement, made the trustee for the owner of the vested water right.

The case poses no questions as the right of the government and the district to make a contract for the delivery of water for irrigation purposes which is not beyond the scope of their powers, and, to the extent that such a contract is not beyond the power of either to make, it is valid. As to the present contract the excess lands provisions are beyond the contractual powers of the district; so are the provisions with respect to the delegation of the governing power of the district; likewise with respect to changing boundaries; and title to escaped waters; and renewal provisions after forty years. The provisions with respect to the delivery of Project water, and the repayment of construction and operating costs are valid and should be so found:

The Water Commission Act of 1913 and the existing provisions of the Water Code changed the mechanics of the procedure for initiating and completing an appropriation of water, but they do not change the attributes of the water rights acquired thereunder. The filing of an application under the present law is comparable and of like effect to the posting and recording of notice or commencement of actual construction work under the rules which had previously prevailed. In *Yuba River Power Co.* v. *Nevada Irr. Dist.*, 207 Cal. 521 [279 P. 128], the court had before it the character of the water rights acquired under the Water Commission Act. In speaking of *Inyo Consol. Water Co.* v. *Jess*, and *Merritt* v. *City of Los Angeles*, it is stated in the Yuba River Power Company case that, "We cannot distinguish these cases from the situation before us. The right being protected and administered is the same. A period of priority was provided, and the protection given there was during such statutory period and prior to any actual construction of diversion works." Under the facts appearing in the Yuba River Power Company case the plaintiff was entitled to the issuance of a permit, although his rights were as yet imperfected. It was held that he had a right protected from impairment by other claimants, although his right was as yet incomplete and conditional. There is nothing in the Yuba City Power Company case to indicate that it stands for the proposition that the Water Commission Act conferred upon an applicant thereunder a greater right than had previously been conferred upon one who filed notice under the former rules. The Water Code provides that the effect of filing an application confers, for all practical purposes, a priority only. Section 1450 states:

Under the provisions of the California Water Code no right to the use of water may be acquired except upon compliance with the permit and licensing requirements set forth in Division 2 of the Code. By Section 1052 of the same code the use of water not authorized by permit or license from the Department of Public Works is made a trespass which may be enjoined. The Bureau of Reclamation is now delivering Project water to the Ivanhoe District, and the District is distributing it without permit or license from the State.

Another established ground for injunction is the withholding from the lands of McCracken the share of the Project water to which they are entitled under the State law. In *Heilbron v. Canal Co.*, 75 Cal. 426 it is held that an interference with a vested water right may be enjoined. (See *Turner v. James Canal Co.*, 155 Cal. 82; and *Miller & Lux v. J. G. James Co.*, 179 Cal. 689.) The taking away or withholding of realty without right may be enjoined irrespective of damage. (*Conde v. Sweeney*, 16 Cal. App. 157, 163.) "Any unlawful interference with the property of another or exercise of dominion over it by which the owner is damnified" will sustain an action in trespass (vol. 24 Cal. Juris. 658 and 665).

Validation proceedings are of an equitable character, and, "Equity, having once obtained jurisdiction of a cause, will dispose of the entire controversy. This rule is expressed in the two maxims that 'Equity will not deal with a case by piecemeal', and 'Equity delights to do justice and not by halves'." (Vol. 10 Cal. Juris. 496.) As is said in *Muchenberger v. City of Santa Monica*, 206 Cal. 635, 646, "A court sitting in equity and having taken jurisdiction,

"Any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Such priority continues only so long as the provisions of law and the rules and regulations of the department are followed by the applicant."

The issuance of a permit following application still does not confer upon the permittee a fully perfected right. Section 1455 of the Water Code states: "The issuance of a permit continues in effect the priority of right as of the date of the application and gives the right to take and use the amount of water specified in the permit until the issuance or [693] the refusal of issuance of a license for the use of water." The final procedural step in perfecting a water right is the issuance of a license as prescribed in sections 1600 through 1677 of the Water Code. But the real basis, measure and limit of the appropriative right is the actual beneficial use of the water. This is inherent in the Constitutional Amendment of 1928 and in section 1240 of the Water Code, which provides: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases."

It appears from the foregoing that neither the Madera Irrigation District nor any other applicant acquired a vested right to a permanent supply of water appurtenant to the lands of the district by the mere filing of applications for the appropriation of water on the San Joaquin River. Such right as was acquired was inchoate and incomplete and subject to defeasance upon the failure to perfect it in accordance with the law.

has broad powers. It may grant relief as varied and diversified as the means employed to produce the grievance complained of, and is not bound to the strict legal rights of the parties." A governmental agency acting, or proposing to act, in excess of its authority is no more exempt from this rule than is an individual acting in his private capacity. Where the facts make a case, a court may in the exercise of its equity jurisdiction issue an injunction to preserve the rights of the parties or to prevent an invasion of these rights by a violation of the law. The District, in its complaint, and McCracken, in his answer, pray for general relief and invoke the court to grant all of the relief consistent with its powers in equity and the facts of the case. As between the district and the landowner the court is empowered under the pleadings of these parties to render such judgment as may be necessary to effect justice between them in the light of the established facts.

It follows that the decree to be entered should provide:

(1) that the Ivanhoe Irrigation District and its board of directors, and all persons acting in concert with, or under them, should be enjoined from distributing the Project water except in accordance with the laws of the State of California and upon such conditions as those laws permit the Department of Public Works of California to impose on its use; that all of the lands of the defendant, McCracken, within the boundaries of the district, are to receive their proportionate share of the Project water delivered to the District;

(2) That the excess lands provisions of the contract are in violation of the vested rights of McCracken in the Project water and cannot be validated; that the water

rights of McCracken are appurtenant to all of his lands; that the District being a trustee for its landowners may not contract in derogation of their vested rights in the Project water;

(3) that the District has no power to contract with respect to a change of its boundaries;

(4) that the contract offered for validation is a contract executed only for the purpose of reimbursing the Federal Government for the expenditures made by it in constructing the irrigation works;

(5) that the District has no power to contract with the Federal Government upon any basis other than in its trust capacity for the landowners of the District;

(6) that the District has no power to contract with respect to escaped waters;

(7) that the ultra vires provisions of the contract form no part thereof but that the contract is otherwise valid.

Counsel for defendant, McCracken, may prepare, serve, and present for settlement appropriate findings of fact and conclusions of law in accordance with the views herein expressed. The other parties appearing may present proposed amendments thereto.

Dated this 31st day of July, 1952.

Benjamin C. Jones,
Judge of the Superior Court assigned

Filed July 31, 1952.

Appendix A-3

In the Superior Court of the State of California
In and for the County of Tulare

No. 39627

The Ivanhoe Irrigation District, an Irrigation District,

Plaintiff,

vs.

All Parties and Persons (etc.),

Defendants.

JUDGMENT*

In the above entitled matter, appearances having been made and issues having been joined, and the cause having been tried and the matter submitted to the Court, and the Court having arrived at its decision and directed that Findings of Fact and Conclusions of Law be drawn, and such Findings of Fact and Conclusions of Law having been prepared and served, and objections to said proposed Findings of Fact and Conclusions of Law having been served and filed, and the matter of settling the Findings having been set down for hearing, and the matter having been argued, and the Court having settled said Findings of Fact and Conclusions of Law, and the same having in writing been duly signed and filed herein,

*Clerk's Transcript pp. 316-318.

Now, therefore, and upon and in accordance with the facts found in said written Findings of Fact adopted by the Court and upon and in accordance with the Conclusions of Law settled and filed by the Court herein, it is hereby ordered, adjudged and decreed as follows:

1 That the contract between plaintiff District and the United States, attached to the complaint herein and designated as Exhibit A, dated September 23, 1949, is invalid, void and without force or effect.

2. That Plaintiff District, its directors, officers, agents, servants, employees, attorneys and those persons in active concert or participation with them, or any of them, who receive actual notice of this judgment by personal service or otherwise be and they are hereby permanently enjoined from performing or taking any action to perform in behalf of said District the said contract or any part thereof and further enjoined from causing or permitting any work of construction to be done in or upon said proposed distribution system, under said contract, in such manner as to incur any liability upon the part of said District or the landowners therein.

3. That the Plaintiff District, its directors, officers agents, servants, employees, attorneys and those persons in active concert or participation with them, or any of them, who receive actual notice of this judgment by personal service or otherwise be and they are hereby permanently enjoined from failing or refusing to supply defendant Courtney McCracken with water for irrigation purposes, with respect to all of his land within said District, upon the same terms and conditions tendered to all other landowners within the District, without discrimina-

tion by reason of the extent of his holdings of land, or on any other basis inconsistent with the findings of fact and conclusions of law signed and filed herein.

4. That the State Engineer is authorized and obligated to proceed diligently with the issuance of permits upon the applications now held by the United States for the benefit of the Central Valley Project, incorporating therein such terms and conditions as may be validly imposed within his discretion under the laws of the State of California. Pending the issuance of such permits, the Ivanhoe Irrigation District and the landowners therein, including the defendant McCracken, may continue as of right to receive and put to beneficial use the Project waters.

5. Defendants appearing herein are entitled to their costs.

Dated: February 27, 1953

Benjamin C. Jones (Signed)
Judge of the Superior Court, Assigned

Filed February 27, 1953.

to the voters in the district, the alleged defects need not recur.

In accordance with the views expressed herein and in *Ivanhoe Irr. Dist.* v. *All Persons, ante,* [1]p. —— [—— P. 2d ——], the judgment is modified by striking therefrom (a) that portion which holds that by the mere application for the appropriation of water for a public use within the district or by actual use by landowners in the district of water being furnished by the United States pending negotiations for a contract, the landowners of the district acquired a vested right appurtenant to their lands entitling them to perpetual service as a part of the freehold; (b) that portion which holds that an individual landowner, a member of the class entitled to the benefits of an irrigation district, acquires any permanent right to such benefits appurtenant to his lands when he ceases to be a member of that class; (c) those portions of the judgment which hold that the following provisions of the contract designed to secure repayment of construction costs to the United States are invalid: (1) that part withholding water from lands in default of proper charges although the district may not be in default as to the United States, (2) that part reserving to the United States the right to repossess waste, seepage and return flow which escapes or is discharged beyond the district boundaries, (3) that part limiting changes in boundaries, consolidations, mergers and dissolutions during the term of the contract and (4) that part subjecting all lands within the district to ad valorem taxes to defray charges imposed by the district.

[1] [3]Advance Report Citation: *Ante,* p. 603 [Herein p. 1].

(Vol. 47 A.C. 685, 306 P. 2d 886.)

Appendix B-1

[Sac. No. 6489. In Bank. Jan. 24, 1957.]

MADERA IRRIGATION DISTRICT, Plaintiff and Appellant, v. ALL PERSONS, etc., Respondents; THE PEOPLE et al., Defendants and Appellants.

APPEAL from a judgment of the Superior Court of Madera County. Benjamin C. Jones, Judge.* Modified and affirmed.

Proceeding by an irrigation district to obtain confirmation of a contract entered into by it with the United States, by which the United States undertook to deliver water from the Central Valley Project to the district and to expend funds [686] for the construction of a distribution system within the district. Judgment for objecting defendants, modified and affirmed.

SHENK, J.—This is an appeal by the plaintiff Madera Irrigation District and certain of the defendants from a judgment refusing to confirm a proposed contract between the United States, acting by and through the Bureau of Reclamation of the Department of the Interior, and the plaintiff district. The contract is substantially the same as that considered in the companion case of *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [1]p. —— [—— P.2d ——], this day decided. Except as to certain matters hereinafter referred to the issues are also the same as in that case.

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*Assigned by Chairman of Judicial Council.

[1]Advance Report Citation: *Ante,* p. 603 [Herein p. 1].

As so modified the judgment is affirmed, the respondents to recover costs on appeal.

Schauer, J., Spence, J., and McComb, J., concurred.

GIBSON, C. J., Dissenting.—For the reasons stated in my dissenting opinion in *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [2]p. —— [—— P. 2d ——], I would reverse the judgment.

Traynor, J., concurred.

CARTER, J., Dissenting.—This is a companion case to *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [2]p. —— [—— P. 2d ——], and for the reasons stated in my dissenting opinion in that case, I would reverse the judgment. [697]

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[2]Advance Report Citation: *Ante,* p. 653 [Herein p. 64].

district agrees to convey to the United States without cost the unencumbered fee simple title to any land owned by the district, or perpetual easements therein, required for right of way purpose for the distribution system. Title to all the project works, including the distribution system, is to be and remain in the name of the United States until otherwise provided for by the Congress, notwithstanding the transfer of any such works to the district for operation and maintenance. The district must repay to the United States the actual cost of the distribution system. The obligation is to be paid in 40 successive, equal annual installments, the first of which shall become due in the year following a two-year development period after the year in which the system shall become available for use. At the commencement of the development period the district will take over and at its own expense operate and maintain the distribution system, subject to the right of the United States to take possession of the system upon the failure of the district to perform its contractual obligations.

The above provisions of the contract with reference to cost, work, land limitation and payment by the district are substantially the same as those in the Ivanhoe contract. There are, however, two additional provisions in the contract here involved which recognize and modify the terms of the 1939 contract, by which the district conveyed the Friant Dam site and other interests to the United States. Article 2 of the present contract modifies and adjusts the amount of water to which the district might have asserted a [690] priority right under the 1939 contract, and article 4 states that the present contract is in satisfaction of this right only for its 40-year term, after which it may

be extended, as distinguished from the Ivanhoe contract wherein the United States did not undertake to supply water beyond the 40-year term of the contract.

For reasons stated in the Ivanhoe case the contract in the present case is ineffective in that it purports to deprive the landowners of the plaintiff district of vested rights as members of the class who are the beneficiaries of the trust under which the United States acquired appropriative rights to the domestic waters of this state; in that it seeks to deprive so-called "large landowners" of rights to waters for their lands in excess of 160 acres although such landowners are qualified members of the class who are the beneficiaries under the declared trust, and who are denied thereby due process and equal protection of the laws; in that it, by implication or otherwise, purports to grant to the United States the right to distribute water for irrigation at a price without compliance with the laws of this state relating to the distribution of its domestic water; in that it, or to the extent that it, by implication or otherwise, reserves to the United States the right to determine at its own discretion whether to continue the distribution of water to the plaintiff district and landowners therein after the termination of the present contract, and in that it by implication or otherwise fails or refuses to recognize the debtor-creditor relationship of the parties for repayment of costs of construction of the storage and distribution system.

In addition to the foregoing there are other issues which are not included within the determinations in the Ivanhoe case. The first of these relates to the nature of rights which accrue by the filing of an application to appropriate water,

As noted, certain defendants appeared who were not landowners in the plaintiff district. These defendants were landowners within the district at the time the district contracted with the United States for the conveyance of the Friant Dam site and other interests. It appears that subsequently on their own petition the lands of these defendants, comprising some 19,500 acres, were excluded from the district; that these landowners intended to form an independent irrigation district and sought to obtain from the plaintiff district a proportionate share of the benefits under the 1939 contract, particularly a share of the priority right to contract for project water. Under the present contract the amount of priority water to which the Madera Irrigation District was entitled under the 1939 contract was reduced in proportion to the reduction of acreage in the district since the 1939 contract. But the excluded landowners assert that the United States has refused to confer upon them that reduced portion of the priority right under the 1939 contract, and that to refuse to do so constitutes a deprivation of property without due process of law. Their claim was asserted as an additional ground for the invalidity of the present contract, and the trial court so held.

Whatever may be the rights of the excluded landowners under the 1939 contract, it does not appear that they have individual rights which may be asserted under the contract sought to be validated or to any of the property or rights held by the district. Since 1879 the Constitution has [694] provided in section 1, article XIV, that the use of all waters "appropriated . . . for sale, rental or distribution is hereby declared to be a public use. . . ." No statement is there made as to the appurtenance of such waters to the

lands involved. Under that section of the Constitution the use of waters involved in the present case is a public use. The nature of the water right to which a landowner entitled to service from an entity which has appropriated waters devoted to a public use, has been the subject of prior litigation in this state. In *Leavitt* v. *Lassen Irr. Co.* (1909), 157 Cal. 82 [106 P. 404, 29 L.R.A.N.S. 313], a landowner sought to reserve to his private ownership a portion of waters he had appropriated for a public use. In holding that he could not establish an outright private ownership of waters appropriated for a public use, the court relied on the constitutional provision above set forth. It was stated at pages 89 and 90: "In *McCrary* v. *Beaudry*, 67 Cal. 120 [7 P. 264], is contained the first statement of this court in construction of the constitutional provision: 'Whenever water is appropriated for distribution and sale, the public has a right to use it, that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner.' And in the late case of *Hildreth* v. *Montecito Creek Water Co.*, 139 Cal. 22 [72 P. 395], it was said by Mr. Justice Shaw, speaking for the court in Bank, in defining the public use declared by the constitution: 'In the case of a public use, the beneficiaries do not possess rights to the waters which are, in the ordinary sense, private property. A public use 'must be for the general public or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates.' (*McQuillen* v. *Hatton*, 42 Ohio St. 202.) . . : The right of an individual to a public use of water is in the nature of a public right possessed by reason of his *status* as a person of the

class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not.'"

In *Miller* v. *Railroad Com.*, 9 Cal. 2d 190 [70 P. 2d 164, 112 A.L.R. 221], in passing on the nature of the right held by one entitled to participate in the distribution of irrigation water devoted to a public use, the court stated at page 199: "This right is simply a right of service, a right to be furnished with water by the utility upon payment of the price, and not a water right in the ordinary sense of 'a private freehold interest in the freehold of the distributing company.' (*Glenn-* [695] *Colusa Irr. Dist. v. Paulson, supra,* 75 Cal. App. 57 [242 P. 494].)"

From the foregoing it is established that a landowner within an irrigation district does not possess as a part of his freehold estate a proportionate ownership in assets of the district. The concept of ownership existing in the relationship between a district and a landowner therein was further considered in *Jenison* v. *Redfield*, 149 Cal. 500 [87 P. 62], wherein a landowner sought damages from the district for refusing to deliver to him his pro rata share of the district's water supply, which he proposed to use on land owned by him outside the district. The court in denying relief used the following language: "It is apparent that to sustain the claim of plaintiff, it must be held that the effect of our statutes relative to irrigation districts, is to make each owner of land within a district the absolute owner of a proportionate share of the water of the district to which his land entitles him, to do with as he sees fit. . . . It seems very clear that such a conclusion would be op-

posed to the whole plan or scheme of the legislation for irrigation districts, converting a district . . . into a mere agency for the distribution of its water to individuals for use by them outside the district for any pu pose whatever. . . . Such a construction of the provisions of the Irrigation Act entirely ignores the object of its enactment." Although the above case dealt with lands which never had been within a district, and the present case with lands which were once within the plaintiff district and later excluded, there is nothing in the law which would justify the conclusion that the owners of properly excluded lands were possessed of rights which attached to their lands.

Nothing said herein is inconsistent with the cases which hold that the members of an irrigation district are the beneficial owners of the water rights of the district. (*Merchants Nat. Bank* v. *Escondido Irr. Dist.*, 144 Cal. 329 [77 P. 937], and cases there cited.) The trust under which water rights and other property of an irrigation district is held by the district is for the benefit of a particular class of individuals. Those indiyiduals are the equitable owners. Individual members within that class can demand services to which they are entitled if they qualify and as long as they qualify as members of that class.

Questions are raised as to the sufficiency of the notice of election whereby the electors of the district were called upon to approve or disapprove the proposed contract. The trial court concluded that the contract was invalid for lack of [696] proper notice. (Wat. Code, §23223.) These questions need not be determined on this appeal for the reason that upon the submission of any further proposed contract

Appendix B-2

In the Superior Court of the State of California
In and for the County of Madera

No. 8502

Madera Irrigation District,
Plaintiff,

vs.

All Persons having or claiming to have any interest in the contract entered into on the 14th day of May, 1951, etc.,
Defendants.

ORDER FOR FINDINGS*

The principles governing the decision in the case o Ivanhoe Irrigation District v. All Persons, etc., pendin in Tulare County are applicable with equal, if not greate force in this case.

Judgment should go for the appearing defendants an their counsel may prepare and present appropriate find ings of fact and conclusions of law in accordance with th views expressed in the Memoranduin of Decision in th Ivanhoe case, a copy of which said Memorandum is at tached hereto and made a part hereof.**

Dated: This 20th day of August 1952.

Benjamin C. Jones
Judge of the Superior Court, assigned

Filed August 19, 1952.

*Clerk's Transcript p. 395.
**Herein pp. 113 *et ff.*

Appendix B-3

Recorded Judgment Vol. 6 Page 194

In the Superior Court of the State of California
In and for the County of Madera

No. 8502

Madera Irrigation District,
Plaintiff,

vs.

All Persons having or claiming to have any interest in the Contract entered into on the 14th day of May, 1951, between Madera Irrigation District and the United States, providing for a water supply for the Madera Irrigation District from the Friant Dam, and the construction of a distribution system in said District to the United States,
Defendants.

JUDGMENT*

In the above entitled matter, appearances having been made and issues having been joined, and the cause having been duly tried and fully argued both orally and in writing, and the matter submitted to the Court, and the Court

*Clerk's Transcript pp. 556-581.

having directed that Findings of Fact and Conclusions of Law be drawn, and proposed Findings of Fact and Conclusions of Law having been prepared and served, and objections to said proposed Findings of Fact and Conclusions of Law having been set down for hearing, and the matter of settlement having been extensively argued, and the Court having settled said Findings of Fact and Conclusions of Law, and the same having heretofore in writing been duly made, signed and filed herein,

Now, Therefore, and upon, and in accordance with the law and the facts found in the case by the Court, and the conclusions reached by the Court, it is hereby Ordered, Adjudged and Decreed as follows:

I.

That the contract between the plaintiff District and the United States attached to the complaint herein and designated as "Exhibit A", dated the 14th day of May, 1951, and the election proceedings and the election held in connection therewith are illegal, void and without force or effect.

II.

That the non riparian and unappropriated water within the State of California is the property of the People of the State of California, but the right to the use of this water may be acquired by appropriation in the manner provided by the laws of the State of California. That the general welfare of this State requires the conservation of and putting to beneficial use the water resources of the State. That there is vested in the State the power to determine the use to which such unappropriated water may

be applied, and permits and licenses for the appropriation of such water may be conditioned in keeping with the use to which it is to be applied. Under the Constitution of the United States and in particular the Tenth Amendment thereto, no federal enactment, rule or regulation may override or abolish the provisions or requirements of the Constitution or the laws of the State of California in relation to the appropriation and use of waters within the State. In enacting the Federal Reclamation Act of 1902, Section 8 thereof, and in other legislation, the Congress of the United States has expressly recognized that the use of water in California is regulated by the laws of this State.

III.

The United States is not the owner of the water supplied and to be supplied from the Central Valley Project to the lands within the plaintiff District. The interest of the United States in such water is limited in all respects by the law of this State to its function as the storer and the carrier of the water to be delivered from Friant Dam as a part of the Central Valley Project of California. (The word "law" being herein used to include, unless otherwise indicated, the Constitution, statutes, rules and regulations, and court and administrative decisions of this State.) The United States, to the extent that such water may be available, is obligated to deliver it to the lands that now are, and were, within the Madera Irrigation District in 1939, including the lands now within said District and 19,500 acres since excluded from said District, which are more particularly referred to and described in the Findings of Fact. This said obligation, among other sources, stems

from the appropriative rights of said District and the landowners therein; from the appropriations made by the predecessors in interest of the Madera Irrigation District, and the Madera Irrigation District, for said lands; and from the appropriations made by and through the Director of Finance of the State of California for all of said lands. The United States is obligated to acquire from the State of California through the office of State Engineer, permits and licenses for the use of water for said purposes and the use which the United States may make of such water is limited by the conditions which the said State Engineer may lawfully and reasonably impose under State law relating to such appropriations of said water. That this judgment is not intended to, and does not in anywise interfere with, restrict, or limit the lawful discretion of the State Engineer in acting upon all such applications and the issuance of permits and licenses pursuant thereto and in conditioning the same in the interest of the people of this State.

IV.

The Madera Irrigation District is a lawfully organized and existing irrigation district organized and existing under the laws of the State of California with the capacity to contract with the Federal Government, but only to the extent permitted by State Law. That no such contract is valid to the extent that it is inconsistent with the law of this State or in conflict therewith.

V.

That the notice of election published by the Madera Irrigation District for the election to be held on the 9th day

of May, 1951, was and is invalid, illegal and of no force and effect and that the election purportedly held on the 9th day of May, 1951, was improperly and illegally called and held in that, among other things, said notice did not designate or set forth the maximum amount of money to be paid by said District to the United States and, in particular, did not set forth or specify or indicate the properties of the District which were to be conveyed by the District to the United States, which such properties included a portion, if not all, of that certain irrigation system within said District known as the "Eminert System". That no approval of the purported contract marked "Exhibit A" could have resulted, or did result, from this said purported election. That said election was not duly or regularly held as provided by law and was not noticed as required by law. That the publication by the Board of Directors of said District of false and misleading statements concerning the provisions of said contract as set out in the Findings of Fact constituted a fraud, and the true results of said election cannot be ascertained.

VI.

That the water rights, real property and other properties and in particular the land, ground and site upon which Friant Dam is now built, together with a gravel pit and supply of gravel and material for construction of said Dam, together with rights of way and easements and water rights and filings upon waters of the San Joaquin River, as more particularly set forth and described in that contract dated the 24th day of May, 1939, and in the Findings particularly found upon, were acquired and held by the Board of Directors of Madera Irrigation District in

trust for all of the landowners within the boundaries of said District as said boundaries were then constituted; that said boundaries then contained all lands of the answering defendants herein.

VII.

That any right, title or interest which the United States acquired under and by virtue of the said contract dated the 24th day of May, 1939, in and to said properties and water and water rights was and is held in trust by the United States for the benefit of all landowners within the Madera Irrigation District and the owners of the 19,500 acres excluded from said District, including these answering defendants and their predecessors in interest.

VIII.

That the contract dated the 24th day of May, 1939, between Madera Irrigation District and the United States is a valid and existing agreement, subject to the trusts and limitations herein referred to and adjudged to exist.

IX.

That the right to receive a water supply pursuant to the contract dated the 24th day of May, 1939, was held by Madera Irrigation District as trustee for the use and benefit of all of the landowners within the District, together with the landowners of the 19,500 acres of land since excluded from said District; that all of the landowners within the Madera Irrigation District, together with the landowners of the said 19,500 acres of land, and including all of these answering defendants were and are the beneficiaries of said trust. That the purported transfer by Ma-

dera Irrigation District to the United States, in the document dated the 14th day of May, 1951, and before this Court for validation, of the pro rata share of the rights to receive a water supply pursuant to said 1939 contract for the 19,500 acres to the United States constitutes taking of property without due process of law and without just compensation.

X.

Prior to the execution of the contract dated the 24th day of May, 1939, and at all times subsequent thereto, Madera Irrigation District held as trustee for all of the landowners within the boundaries of said District, including the landowners of the said 19,500 acres excluded from said District, a vested right to a permanent supply of water from the San Joaquin River and other sources, appurtenant to all of the lands then in said District, subject to and in accordance with the laws of the State of California, by reason of applications to appropriate unappropriated water from said river and other sources duly filed by the said District or its predecessors, with the State Engineer, Division of Water Resources of the State of California; that the purported substitution by the contract marked Exhibit "A", dated the 14th day of May, 1951, now before the Court for validation, of a temporary right to receive project water from the United States in accordance with the terms of said contract marked Exhibit "A", in lieu of said appropriative rights to a permanent water supply, initiated by said District, in accordance with State law, constitutes a deprivation of property to the landowners within Madera Irrigation District and the landowners of the said 19,500 acres of land excluded from Madera Irrigation District to the use of said waters by reason of

the limitations imposed upon them by Articles 28, 29 and 30 of the contract without due process of law and without just compensation therefor and is a breach of the recited trusts.

XI.

That it was agreed between the United States and plaintiff Madera Irrigation District, by the contract dated the 24th day of May, 1939, that the owners of all of the lands within the boundaries of the plaintiff Madera Irrigation District, including the 19,500 acres excluded from the boundaries of the District were and are permanently entitled to delivery by the United States of the quantities of water set forth in this contract; that said contract right is binding upon the United States subject only to the assignment of a portion of said quantity of water to the Chowchilla Water District pursuant to the agreement dated the 24th day of August, 1949, accepted and approved by the Secretary of Interior of the United States on the 16th day of September, 1949, that the owners of said lands were, and are, entitled to the delivery of such quantities of water without any of the restrictions or conditions set forth in Articles 28, 29 and 30 of the alleged contract before the Court; that said contract right to receive said water is a continuing right to a permanent delivery of water from the project to all lands in said District, appurtenant to the lands irrigated, subject to and in accordance with the laws of the State of California; that the United States is entitled to payment therefor at the rate of not to exceed $3.50 per acre foot for Class 1 water and $1.50 per acre foot for Class 2 water, which waters are defined in said contract dated the 24th day of May, 1939; that said

Madera Irrigation District and the landowners, and each of them, are entitled to a credit to the extent of such payments by the United States toward the discharge of the District's share of the construction costs of the Central Valley Project as more particularly hereinbefore and hereinafter set forth.

XII.

In order for the United States to carry out the purposes of the Central Valley Project, particularly the delivery of water therefrom to project beneficiaries, including plaintiff District and its landowners, it became desirable and expedient that the State of California assign in trust to the United States for the uses and purposes of the Central Valley Project applications to appropriate unappropriated water and the water rights referred to in Findings XII, XVII, XXV, XXVI, and XXVII and also to acquire other applications and the appropriative and other rights to water referred to in Findings VI and VII and to perfect all such applications by securing permits pursuant to the laws of the State of California, for the use of all such water by said project beneficiaries, including the plaintiff District and the landowners therein and the landowners of the 19,500 acres now excluded from the District. All rights to the use of water heretofore acquired by the United States for the purposes of the Central Valley Project, as well as all rights to the use of water in process of acquisition and to be acquired for such purposes, are held by it in trust for the beneficiaries of said project, including the plaintiff District and its landowners and the landowners of the 19,500 acres more recently excluded from the District, all of whom have a present and

vested right to the faithful fulfillment and execution of said trust. That for the last several years, water has been delivered through the Central Valley Project by the United States Bureau of Reclamation to the plaintiff District and its landowners for the irrigation of lands within the District; and subject to the laws of the State of California and the discretionary powers of the State Engineer in issuing permits and licenses, said District and its landowners, and the landowners in said 19,500 acres excluded from said District, have acquired vested and existing property rights to a permanent supply of project water, which said rights are now vested in said landowners as appurtenances to their land, subject only to those reasonable conditions imposed by State Law, and to a defeasance upon failure of use; that by the transfer to the United States by the District of the rights of the District to appropriate water pursuant to its applications which had theretofore been filed with the State Engineer of the State of California, the owners of land within the 19,500 acres excluded from the District, and the District on behalf of its landowners, have acquired and now possess additional vested property rights to a permanent supply of project water in addition to those originating in the filings made by the Director of Finance of the State of California.

XIII.

Any and all rights to the use of water acquired or to be acquired by the United States for purposes of said project are held in trust and dedicated to carrying out the purposes and objects of said project, including the delivery of said water to plaintiff District and its landowners, and the landowners of the 19,500 acres excluded from said District;

and such water is required to be delivered to such lands for use thereon and as appurtenant to the lands irrigated thereby, subject only to conditions lawfully imposed in accordance with the law of this State, and under the burden of repayment to the United States of the reasonable charges for storing and transporting such appropriated water.

XIV.

Permits issued to the United States pursuant to the applications to appropriate unappropriated waters for the Central Valley Project vest in the United States rights as trustee only, with the beneficial title to such waters in the landowners within the service area of the project. The owners of any and all lands within the Madera Irrigation District, and of the 19,500 acres excluded, are entitled to equal rights to receive water from such project without discrimination and to apply such water upon their lands, subject only to lawfully imposed conditions in accordance with State law, and the payment of charges sufficient to return to the United States its due proportion of the reimbursable and returnable costs of the project.

XV.

The Secretary of Interior in constructing, operating and maintaining the Central Valley Project has at all times been, and now is, under mandate from the Congress of the United States to proceed in accordance with the laws of the State of California in acquiring rights to the use of water for purposes of said project and to hold and retain such applications, rights and interests not for its own use and benefit but for the use and benefit of the beneficiaries of the Central Valley Project, including the plaintiff Dis-

trict and the landowners therein, and the landowners of said 19,500 acres excluded from said District. The right, title and interest, and ownership of all rights, to the use of water acquired or to be acquired by the United States for the purposes of said project, immediately upon the acquisition of such rights, gave, and do give, rise to a resulting trust, with the State of California, as the trustor, the United States, acting through the Secretary of the Interior and the United States Bureau of Reclamation, as trustee, and the landowners contemplated to be served with water by means of the project as the beneficiaries of such trust; and the United States as trustee for all project beneficiaries has the duty and obligation, which it has failed yet to perform, to perfect its applications to appropriate water in accordance with the law of this State.

XVI.

The operation of the Central Valley Project as authorized, done and maintained by the United States is a Federal assistance program, and the Secretary of the Interior in expending Federal funds for the construction, operation and maintenance of the project, has so done, and is doing so, subject to ultimate appropriate repayment by the ate, or local Districts and agencies thereof, of the reimbursable costs of the project in accordance with the Federal Reclamation laws.

XVII.

The United States has the right, duty and obligation to recover, in accordance with the Federal Reclamation laws, that portion of the reimbursable project construction costs allocated to irrigation and assigned for repayment by the

water users; and the District and all landowners therein, including the defendant landowners herein appearing, are obligated to pay for a proportionate share of the cost of delivery of project water, and a proportionate share of the project construction costs, and in the payments made for such purposes are entitled to credit for that portion of payments which should appropriately be applied to the repayment of project construction costs.

XVIII.

The District and its landowners upon the repayment of a proportionate share of the project construction costs are entitled, subject to compliance with State law, including such reasonable conditions as may be imposed by the State Engineer in permits and licenses to use the water, to the continued delivery of project water by the United States as a right appurtenant to all of the district lands at such rates only as may be required to cover the District's proportionate share of the costs of operation and maintenance.

XIX.

The directors of the District in the management of the affairs thereof, and in the delivery of water made available by the project to the landowners therein, are governed solely by the laws of the State of California relating to irrigation districts.

XX.

The District is an organization created and governed by and for the electors thereof and bears a trust relationship to the landowners therein and in carrying out such trust is obligated by the law of this State relating to irrigation districts, to deliver the water received by it from

said Central Valley Project to each parcel of land within the District regardless of the size thereof, in the proportion that District assessment on each parcel bears to the entire District assessment on all lands within the District.

XXI.

In dealing with irrigation districts and other users of project water for irrigation, the Legislature of this State may not, consistent with the California Constitution, and particularly Article IV thereof, delegate to Congress the power to legislate relative to the use of such water in contravention of the law of California, nor authorize the Secretary of the Interior to enforce regulations of the Department of Interior relative to the use of project water in contravention of the laws of this State.

XXII.

Subject to the rights of the State of California and the Water Project Authority of the State of California, as recited and found in Paragraphs XIII and XVII of the Findings herein, the United States and the plaintiff District may lawfully enter into a contract for the delivery of water and repayment by the District to the United States of that portion of said project costs properly allocated to irrigation and assigned for repayment by the water users, and found by the Secretary of the Interior to be within the ability of the water users to repay, and providing for an annual charge by the United States to the plaintiff District, including construction charges, and operation, maintenance and overhead charges, allowing credit for the payments made by the District upon such charges and providing that when such charges have been paid in full no further con-

struction charges shall be collectible from the plaintiff District or the landowners therein.

XXIII.

The United States may not, by virtue of its physical possession of the dams, reservoirs and main canals constituting the major works of said Central Valley Project, or by virtue of the possession of any other works necessary or useful in the delivery of stored waters of the Central Valley Project, withhold, waste, or otherwise prevent the application to beneficial use of Central Valley Project waters, but is obligated to conform to the laws of the State of California relative to the control, appropriation, use and distribution of the waters of the Central Valley Project, and in that connection is required to permit such water to be put to beneficial use in accordance with the laws of this State and to recognize any and all vested rights therein. In delivering Central Valley Project water, the United States is subject to the authority of the State Engineer of the State of California as the executive officer of the Division of Water Resources of the Department of Public Works of the State of California as prescribed by the laws of this State in respect to the acquisition of rights to the use of water by appropriation and respecting the use of such water. Any and all rights to the use of water acquired or to be acquired, by the United States for purposes of the Central Valley Project are dedicated to carrying out the purposes and objects of the project, including the delivery of water to plaintiff District and its landowners and the landowners of said 19,500 acres so excluded from said District. The water delivered, and required to be delivered, to such lands is under a right appurtenant to the

lands upon which it is used, subject only to conditions lawfully imposed in accordance with State law, and to defeasance upon lack of use; but subject further, however, to the payment to the United States of the reasonable and appropriate charges in repayment of its reasonable and necessary construction, operation, maintenance and replacement costs.

XXIV.

The plaintiff District and the landowners therein are entitled, subject to the rights and interests of the State of California and its agencies, including the exercise of the lawful discretion of the State Engineer, to a contract for the delivery of water by the United States to all lands within the plaintiff District, which contract shall recognize and provide for a permanent and appurtenant water right, conditioned, among such other reasonable requirements as may be imposed, upon continued beneficial use, and additionally subject to a fixed maximum charge to be paid by the plaintiff District for the plaintiff's share of the construction costs of the major works of the Central Valley Project used or useful in the delivering of water to the plaintiff District, as such costs have been allocated to irrigation and in part assigned for repayment by the water users within their ability to repay the same, and in which contract a credit to the District upon such costs and a manner and method of accounting for such credit is provided for.

XXV.

It is adjudged to have been determined by the Secretary of the Interior, that to the extent that water may be available to the United States for such purposes, the plaintiff

District and its landowners subject to the discretionary powers of the State Engineer in issuing permits and licenses to appropriate waters as herein found and concluded, are entitled each year, under an appropriate contract, to not less than the quantities of Class 1 and Class 2 water as specified in Part A of the purported contract; and that the charges specified in Part A of the purported contract contain a component for the return by plaintiff District of some part of its proportionate share of project construction costs, and that such charges, pursuant to an appropriate contract, are reasonable and within the ability of plaintiff District and its landowners to pay and are adequate to repay to the United States; each year, an appropriate share of the necessary construction, operation and maintenance costs.

XXVI.

The following provisions of said contract of May 14, 1951, are invalid, void and without force or effect:

A. Article 20 of the contract, purporting to condition the delivery of water upon the payment of void assessments.

B. Article 22 of the contract, purporting to impose a penalty unknown to California law with respect to land which is in default in payments to the District although the District is not in default in its payments to the United States.

C. Article 6(c) of the contract, purporting to forbid the District from disposing of surplus water outside the District.

D. Article 9(c) of the contract, purporting to reserve to the United States the right to all waste, seepage and re-

turn flow which escapes or is discharged beyond the District's boundaries.

E. Article 11 of the contract, purporting to forbid the District from delivering or furnishing any water required under the contract for other than agricultural purposes.

F. Article 26 of the contract, purporting to forbid the District from making any change in its boundaries, such as by the inclusion or exclusion of lands.

G. Articles 28, 29 and 30 of the contract, purporting to forbid the District from furnishing water made available under the contract to any lands in excess of 160 acres, held by any single beneficial owner, unless the owner complies with certain further requirements, including the sale of all land in excess of said 160 acres at prices not in excess of those approved by the United States Secretary of the Interior.

H. Articles 19 and 21 of the contract, purporting to hold all lands within the District subject to an *ad valorem* tax to defray the charges imposed upon the District by the contract, notwithstanding the provisions of Articles 28, 29 and 30 of the contract, above mentioned, prohibiting the furnishing of water to land in excess of said 160 acres.

XXVII.

The contract of May 14, 1951, is invalid under State law, including the State Constitution, Article XIV, Section 3, for the following reasons:

A. Neither the contract, nor the notice of election which preceded it, contains or contained any statement of the maximum amount of money to be payable to the United States for construction purposes and cost of water supply

and acquisition of property, nor any provision for the crediting of the payments to be made under such contract to the cost of the project.

B. The contract does not provide for or recognize a water right appurtenant to the lands within the District; the contract contemplates and permits a continuing power in the Federal Government to furnish or withhold water at the end of the contract period upon such terms and conditions as the United States may then impose.

C. The contract is contrary to State law in that it purports to deprive the lands within the District, and particularly the lands of the landowner Defendants and those similarly situated, of present existing and vested water rights existing under and by virtue of the laws and the Constitution of this State.

XXVIII.

The contract of May 14, 1951, is invalid and unenforceable because the numerous provisions, purporting to vest an uncontrolled discretion in the Secretary of the Interior, are so ambiguous, indefinite, uncertain and lacking in mutuality as to obviate any basis of contractual undertaking recognized by the laws of California.

XXIX.

The provisions of said Irrigation District Federal Cooperation Law (State Water Code, Section 23197) authorizing the inclusion of a contractual provision for the delivery and distribution of water under Acts of Congress and the rules and regulations established thereunder, authorizes such delivery and distribution only under such acts, rules and regulations as are consistent with the laws

of this State. The contract imposes conditions on the delivery and distribution of water which are inconsistent with State Law, the Constitution of the State of California, the Constitution of the United States, and the Reclamation Act of 1902.

XXX.

The contract of May 14, 1951, is invalid in that it provides that the Secretary of the Interior, pursuant to rule and regulation, may in relation thereto apply numerous unrepealed provisions of the Act of Congress of June 17, 1902, and acts amendatory thereof or supplementary thereto, all collectively styled the Federal reclamation laws, and generally referred to in the contract as the basis thereof; that the application to the contract of many of such provisions would adversely and materially affect the contract and the rights of the District and the landowners thereunder, in violation of the laws of the State of California.

XXXI.

The contract is in violation of Federal law in the following particulars:

A. Part A of the contract purports to be a utility contract for the sale of project water to persons in whom the right to the use of such water is already vested.

B. The contract does not state the total or any amount to be repaid by the District and its landowners of that portion of the reimbursable costs of the profit allocated to irrigation and assigned for repayment by the water users; and fails to provide credit for any part of the annual rates

for water to the repayment of the District's obligation for project construction costs.

C. The contract destroys the right of the District and its landowners to acquire the right to a permanent delivery of project water appurtenant to the land irrigated, the intendments of the contract being that at the end of 40 years no project water will be delivered to the District except in the discretion of the Secretary of the Interior.

D. The provisions of Sections 28, 29 and 30 of the contract relating to excess lands are in violation of Section 8 of the Reclamation Act of June 17, 1902, in that such limitations on the acreage to which water may be delivered is in violation of the laws of the State of California.

XXXII.

The contract by its terms and provisions is unenforceable for the reason that it is indefinite, uncertain, misleading and lacking in mutuality regarding the relationship of the parties toward each other with respect to project water and the relative rights and duties of the respective parties in connection therewith, and for the reason that it denies to the District and its landowners the assurances required of the United States in its trustee relationship toward project beneficiaries with regard to the rights of the District and its landowners to a permanent supply of project water appurtenant to the land irrigated.

XXXIII.

Part A of the contract, including the provisions limiting the term thereof to 40 years, is inseparable from Part B thereof, providing for a major and permanent investment

by the District in connection with the construction of a distribution system by the United States within the District for the distribution of project water to lands within the District, and the invalid provisions of the contract materially affect and are inseparable from other provisions of the contract.

XXXIV.

In the circumstances of this case, the failure of the United States to secure permits from the State for the use of project water has not, and may not be deemed to have, impaired the vested rights acquired by the Madera Irrigation District and the landowners therein, including the answering landowner defendants, to the continued use of the project waters. Pending the issuance of proper permits, the said District and its landowners may continue to receive and put to beneficial use project waters in the exercise of their vested rights therein.

XXXV.

That plaintiff District, its directors, officers, agents, servants, employees, attorneys and those persons in active concert or participation with them, or any of them, who receive actual notice of this judgment by personal service or otherwise be and they are hereby permanently enjoined from performing or taking any action to perform in behalf of said District the said contract or any part thereof and they are further enjoined from causing or permitting any work of construction to be done in or upon said proposed distribution system, under said contract, in such manner as to incur any liability upon the part of said District or the landowners therein.

XXXVI.

That the plaintiff District, its directors, officers, agents, servants, employees, attorneys and those persons in active concert or participation with them, or any of them, who receive actual notice of this judgment by personal service or otherwise be and they are hereby permanently enjoined from failing or refusing to supply the landowner defendants with water for irrigation purposes, with respect to all of their land within said District, upon the same terms and conditions tendered to all other landowners within the District, without discrimination by reason of the extent of their holdings of land, or on any other basis inconsistent with the findings of fact and this judgment made, signed, filed and entered herein.

XXXVII.

The delivery of water by United States to the plaintiff District at charges not to exceed $3.50 per acre foot for Class 1 water and $1.50 per acre foot for Class 2 water, and the collection of funds therefor, and the payment for the costs thereof by plaintiff District to the United States is not enjoined.

XXXVIII.

Defendants appearing herein are entitled to their costs of suit.

Dated: February 1st, 1954.

Benjamin C. Jones
Judge of the Superior Court, Assigned

(Endorsed) Filed Feb. 3, 1954,
Erma E. Cheuvront, Clerk
H. H. Dwyer, Deputy
9:30 A. M.

Appendix C-1

(Vol. 47 A.C. 698, 306 P.2d 894.)

[Sac. No. 6460. In Bank. Jan. 24, 1957.]

PHILLIP ALBONICO et al., Respondents, v. MADERA IRRIGATION DISTRICT (a Corporation) et al., Appellants.

APPEAL from a judgment of the Superior Court of Madera County. Arthur C. Shepard, Judge.* Modified and affirmed.

Proceeding in mandamus to compel an irrigation district to vacate its resolution denying exclusion from district of petitioners' lands in excess of acreage limitations. Judgment for petitioners modified and affirmed. [698]

SHENK, J.—This is an appeal from a judgment for the petitioners Phillip and Jane E. Albonico, husband and wife, in a proceeding for the writ of mandate to compel the respondent Madera Irrigation District to vacate its resolution denying the exclusion from the district of the petitioners' lands in excess of 320 acres. Exclusion is sought on the ground that such excess lands would not be benefited by the operations of the district. (Wat. Code, §§26728, 26729; Code Civ. Proc., §1085.)

A brief history of the Madera Irrigation District from the time of its inception is set forth in the companion case, *Madera Irr. Dist.* v. *All Persons, ante,* [1] p. —— [—— P. 2d ——]. That case involved the validity of a contract entered

*Assigned by Chairman of Judicial Council.

[1] Advance Report Citation: *Ante,* p. 685 [Herein p. 139].

into by and between the district and the United States acting through its Bureau of Reclamation of the Department of the Interior for the sale and distribution of water for irrigating purposes to the landowners in the district. Among other provisions of the contract considered in that case were the so-called acreage limitations and enforced sales provisions. In substance it was provided that a single person owning in excess of 160 acres and a married couple in excess of 320 acres are "large land owners"; that large landowners shall, within 30 days after notice to do so, select the 160 or 320 acres, as the case may be, of his or their lands to be deemed nonexcess; that if a large landowner fails to make such selection the district may do so for him and if the district does not do so, the Secretary of the Department of the Interior of the United States may do so, and that no water may be furnished by the district to excess lands unless and until the nonexcess portions thereof have been selected and the landowner has executed a recordable contract to sell or authorize the Secretary of the Interior to sell within 10 years the excess lands at an appraised sum which the landowner has no voice in determining and without regard to water rights involved in the irrigation project contemplated by the district and the United States.

Following a hearing on the 15th of April, 1951, at which the action of the board of directors of the district was reviewed and other evidence was received, the court made findings to the effect that the entire operations of the district in relation to the lands of the petitioners would be pursuant to the contract with the United States which, by sections 28, 29 and 30, did not contemplate the delivery of

water to the petitioners' excess lands unless they agreed to sell such lands; that "except [699] as to 320 acres thereof, the said lands of the petitioners sought to be excluded would not be benefited by the operations of the Madera Irrigation District"; that "no evidence was introduced" tending to show that such lands would be benefited, and that at the hearing before the board of directors of the District prior to its resolution denying the petition for exclusion there "was no evidence . . . to support [its] finding of fact that lands of the petitioners would be benefited by the operations of the Madera Irrigation District."

Judgment was entered in the alternative, first, "that if the general plan of operation of the Madera Irrigation District, as adopted and applied by the Board of Directors of the District, should continue or require compliance with the excess land conditions or limitations set forth in paragraphs 28, 29 or 30 of the Contract between the Madera Irrigation District and the United States . . . as a condition to petitioners receiving for all of their land their fair, ratable portion of the water distributed by the District for irrigation purpose, then, in that event, a peremptory writ of mandate shall issue from this Court directing and compelling the Board of Directors of the Madera Irrigation District to make its order vacating and setting aside its previous order of April 12, 1951, denying petitioners' petition for exclusion, and to make its order excluding from the Madera Irrigation District the lands of petitioners, except as to 320 acres thereof." In the alternative it was ordered that if the district's plan of operation should "supply all of the lands of petitioners their fair, ratable portion of the water distributed by the district for irriga-

tion purposes, without imposition of the excess land conditions or limitations set forth in paragraphs 28, 29, or 30 of the Contract . . . then and in that event, the writ herein prayed for shall be denied. . . .''

In view of our decisions in *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [1] p. —— [—— P. 2d ——], and in *Madera Irr. Dist.* v. *All Persons, ante,* [2] p. —— [—— P. 2d ——], wherein it was held that excess land provisions in similar contracts were improperly included therein, it must be concluded in this proceeding that the district may not impose on landowners within the district the land limitations contained in sections 28, 29 and 30 of the contract in question, and that all of the petitioners' lands within the district are entitled to their fair, ratable portion of the water distributed and to be distributed by the district for irrigation purposes. (Wat. Code, §22250.) As the petitioners' lands will thus be [700] benefited by the lawful operations of the district under a proper contract for a supply of water to the district a writ of mandate to compel the exclusion thereof from the district is inappropriate and unnecessary. (Wat. Code, §§26728, 26729.)

The judgment is therefore modified by striking therefrom the first alternative by which the petitioners' land might be conditionally excluded and by affirming the second alternative pursuant to which the lands of the petitioners are entitled to their proportionate water supply.

As so modified the judgment is affirmed, the respondents to recover costs on appeal.

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[1] Advance Report Citation: *Ante,* p. 603 [Herein p. 1].

[2] Advance Report Citation: *Ante,* p. 685 [Herein p. 139].

Schauer, J., Spence, J., and McComb, J., concurred.

GIBSON, C. J., Dissenting.—For the reasons stated in my dissenting opinion in *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [1]p. —— [—— P. 2d ——], I would reverse the judgment.

Traynor, J., concurred.

CARTER, J., Dissenting.—This is a companion case to *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [2]p. —— [—— P. 2d ——], and for the reasons stated in my dissenting opinion in that case, I would reverse the judgment. [701]

[1]Advance Report Citation: *Ante,* p. 653 [Herein p. 64].

[2]Advance Report Citation: *Ante,* p. 603 [Herein p. 1].

Appendix C-2

In The Superior Court of The State of California
In and For The County of Madera

No. 8497

Phillip Albonico and Jane E. Albonico, his wife, Petitioners, vs. Madera Irrigation District, a Corporation, and John M. Allen, C. A. Ridgeway, Allen T. Roberts, Dee V. Romans, John A. Franchi, Directors of the Madera Irrigation District, Respondents.	No. 8497

Memorandum Opinion and Order.*

This cause comes on before the Court on the application of petitioners for a writ of mandate. Petitioners seek thereby to compel exclusion of 939 acres of their land from Respondent Madera Irrigation District (hereinafter spoken of as "District"), on the ground that said land would receive no benefit from the operations of said District.

Petitioners own a tract of 1,259 acres of land in District. They have owned, lived on and farmed said land for more than forty (40) years last past, and have paid assess-

*Unreported.

ments on all of said land to District for the past twenty (20) years.

District was organized January 2nd, 1920. It exists under authority of the California Irrigation District Act (Statutes 1897, Page 254) (Now incorporated under the Water Code of California).

During the early years of its existence, District acquired certain water rights, lands and other properties. The money necessary for such acquisition came from assessments on the lands in District, including the land owned by petitioners, which is here subject of dispute.

The current expenses of any water delivery and the repayment of any sums advanced to, or borrowed by, District, to construct canals, headgates or other works of District must likewise come from assessments against all the lands in District, including the land here under dispute. (Sections 25650, 25535 and 25803, Water Code of California) (Contract Sections 19 and 21).

On or about May 24th, 1939, District purported to enter into a contract with the United States through its Bureau of Reclamation (hereinafter spoken of as "Bureau"), whereby water rights and lands owned by district, along the San Joaquin River near Friant, were agreed to be conveyed to Bureau in consideration of the agreements by Bureau to construct a dam on said river for diversion, and a system of canals for delivery, of water from said river to the lands within district, and also in consideration of the payment, or, crediting on construction of works by Bureau for District, of a substantial sum of money. (Par. 3, Page 1, Contract)

On or about May 14th, 1951, District executed a contract with Bureau for the delivery to the lands in District of irrigation water from Bureau's San Joaquin River Friant Dam facility. Such contract forbids District to serve water to more than 320 acres of petitioners' land, unless petitioners agree to sell that part of their 1,259 acres which is in excess of 320 acres, to-wit, 939 acres, at a selling price controlled by an appraisement based on certain artificial factors defined by the contract, and is ultimately subject to approval by Bureau. (Sections 28, 29, 30 of Contract)

Petitioners allege, and at the hearing before this court it was not denied, that said contract is the only method planned by District for the furnishing of water to the lands in District, including the land here under dispute. It was also alleged, and evidence was adduced thereon by petitioners, that petitioners can derive no benefit for the excess lands here under dispute from the operations of the District under said contract. It was further stipulated that Respondent's Board of Directors might view said land. Said Board did view said land, and thereafter made its order denying petitioners' petition for exclusion of the said excess land of petitioners in said District.

The California Irrigation District Act provided at the time of its passage:

> "It is hereby expressly provided that all waters distributed for irrigation purposes shall be apportioned ratably to each land owner on the basis of the ratio which the last assessment of such owner for District purposes within said District bears to the whole sum assessed upon the district."

This provision of statute was later incorporated in Section 22250 of the Water Code. It has not been substantially changed since its first enactment in 1897, and is now in full force and effect. Sections 22250 and 22280, authorizing a water sales method, were added in 1943, but all of these sections contemplate equitable distribution.

It is clear that the principal purpose of the California Irrigation District Act and its successor, the Water Code provisions carried over from said Act, was and is to provide a means by which contiguous land owners might pool their interests under certain condition to obtain water for their lands and jointly pay for the same.

> "The whole object of the legislation authorizing the organization of irrigation districts is to enable owners of lands susceptible of irrigation from a common source, and by the same system of works, to form a district composed of such lands, for the sole purpose of obtaining and distributing such water as may be necessary for the irrigation thereof, thus enabling each one to have for his land in the district, the benefit of a common system of irrigation, and bringing about the reclamation of the land of the district from aridity to a condition of suitability for cultivation." (*Jenison v. Redfield,* 149 Cal. 500 at 503)

In defining the rights of land owners and of the District in connection with the holding by irrigation districts of water rights and other properties, the California Supreme Court said that districts hold said properties

> ". . . in trust for the uses and purposes set forth in the act; . . . the beneficiaries of the trust are the landowners in the district with whose funds the property has been acquired . . .; in whom, indeed is vested by

express provision of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches and property generally, as the means of supplying water. . . . Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of Section 13 of Article I of the State constitution—that 'no person shall be . . . deprived of . . . property without due process of law,' and of the similar provision of Section 1 of the Fourteenth Amendment to the constitution of the United States."

Cited with approval in numerous other California cases. *Tulare Irrigation District v. Collins,* 154 Cal. 440; *Hall v. Supreme Court,* 198 Cal. 373.

Section 1 of Amendment XIV to the constitution of the United States provides, in part, as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Fifth Amendment to the constitution of the United States provides, in part, as follows:

"No person . . . nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Section 1 of Article I of the constitution of the State of California provides as follows:

"All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness."

Section 13 of Article I of the constitution of the State of California, provides, in part, as follows:

"No person shall be . . . deprived of life, liberty or property, without due process of law;"

Section 14 of Article I of the California constitution provides, in part, as follows:

"Private property shall not be taken *or damaged* for public use without just compensation having first been made to, or paid into Court for, the owner, . . ."

The rights of owners of land in and to the property held by various irrigation and drainage districts are referred to in many cases throughout the United States, and it is worthwhile to here quote from a few of them:

"Private property rights acquired under statutes . . . are not subject to legislative invasion by means of new statutes." (*Mooney v. Drainage District No. 1*, 278 Northwestern 368 at 371 (Nebr. 1938))

In a case involving the receiver of a drainage district under state laws, the Supreme Court of North Carolina said:

"The general assembly . . . is without power, by the enactment of subsequent statutes, to affect vested rights of land owners . . ." (*Broadhurst v. Bd. of Commissioners of Pender County Drainage District*, 143 Southeastern 477 (N.C. 1928))

In a dispute between the United States Bureau of Reclamation and a landowner in an irrigation district over certain rights in the water of the La Plata River, the United States Circuit Court of Appeals said:

> "In the sense that the right to the beneficial use of such waters attaches to and follows the lands under the project or canal to which application is made, the appropriative rights may be said to belong to the land owners. This right to the beneficial use on the part of a landowner is, therefore, in the nature of a vested right." (*U. S. v. Tilley,* 124 Fed. 850 at 861 (Nebr. 1941))

In a case in which the Secretary of the Interior attempted to arbitrarily limit water delivery to about two-thirds of the water originally allotted to the landowners of a reclamation project on the Yakima River in the State of Washington, the United States Supreme Court said:

> "Appropriation was made, not for the use of the government, but, under the Reclamation Act, for the use of the landowners . . . the government was and remained simply a carrier and distributor of the water . . ." (*Ickes v. Fox,* 300 U. S., Page 82)

Without particular regard to irrigation districts, but on the subject, generally, of the protection of the rights granted by the constitutional sections quoted, a brief glance at some other cases is in order.

In a dispute over validity of a sale of land held in trust, where the legislature, by special act, attempted to authorize a sale of vested rights of persons sui juris contrary to the powers of trust, the Supreme Court of New York said:

> "Where the parties entitled to future estates are under no disability to act for themselves, the legislature has no constitutional power to cause lands to be sold by special act."
> (*Gedney v. Marlton,* 179 Northeastern 766 (N.Y. 1932))

In a case involving the application of a statute which sought to bar estates tail and reversions and remainders expectant thereon, the Court held that as to estates which have already vested before the passage of such Act, any attempted application is void and unconstitutional. (*Greer v. Edwards,* 77 Atlantic 188)

In another case involving attempted legislative disturbance of vested rights, the United States Supreme Court said:

> "The private rights of parties which have vested . . . cannot be taken away by subsequent legislation . . ." (*Hodges v. Snyder,* 261 U.S. 600 (1922))

In a case involving the already accrued liability of corporate directors and trustees for misappropriated funds, and the repeal by the legislature after such accrual of the law providing for such liability, the United States Supreme Court said:

> ". . . corporate charter may be repealed . . . ; and . . . the interrelations of state, corporation and stockholders may be changed; but neither vested property rights nor the obligations of contracts of third persons may be destroyed or impaired." (*Coombs v. Getz,* 285 U.S. 434 (Calif 1931))

In a case involving attempted restrictions upon the use of real property by Negroes, the United States Supreme Court said:

"It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment or property rights was regarded by the framers of that amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee." (*Shelly v. Kraemer*, 334 U. S. 1)

In a case involving, more particularly, the Constitution of the State of California, the Supreme Court of California said:

"The conclusion is, that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." (*City of Pasadena v. Stinson*, 91 Cal. 238 at 251)

In a case involving assessments for special public improvement, the Supreme Court of the United States said:

"There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property.

"In our judgment the exaction *from the owner of private property* of the cost of a public improvement in substantial excess of the special benefits *accruing*

to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." (Emphasis added) (*Norwood v. Baker*, 172 U.S. 269)

Respondents cite *Shoshone I. D. v. Lincoln Land Co.*, 51 Fed. 128, and *Nampa & Meridan I. D. v. Petrie*, 153 Pac. 425 (Idaho). The question in the case here at bar could have been considered in either of those cases, but a careful examination of both cases shows that the precise question was not considered in either of those cases, and they are of no substantial aid in solving the case at bar. No other case has been called to our attention which appears to involve the type of fact with which we are here confronted.

There are several questions involved in the case at bar, but the one relating to the validity of the so-called 160-acre limitation is, in the opinion of this Court, determinative of all others, and it is, therefore, the only one we shall discuss at length..

It must be remembered that we are not here concerned, nor is the Court attempting to pass on the wisdom of, nor the economic considerations involved in, the legislation relating to the so-called 160-acre limitation; nor are we here considering its validity as it might be applied to the public lands being sold into private ownership. Further, we are not giving any consideration to the question of its application where the private landowners involved have voluntarily consented to the provision. The question of the great desirability for larger numbers of our population to return to rural life is not before us. The question of whether or not there should or should not be a constitutional amendment to provide great land reforms in the

United States is a subject for political discussion, and is not before the Court in this cause.

The question which is before the Court in the case at bar is simply this: Is it constitutional and valid to include, by compulsory measures, into an irrigation district, the land of private land owners; to then levy assessments on that land for twenty (20) years in order to acquire the funds to purchase valuable property for the district; to then sell the property thus acquired to a third party under an agreement by which the third party and the district agree that about three-fourths of the land which has thus paid assessments for twenty (20) years shall not receive any water unless the owner agrees to sell said land at a figure artificially controlled by and subject to the approval of the third party, all without the owner's consent? A briefer way to state the question is:

Is the Provision of the 1951 Contract, Forbidding Water Service to Petitioners' Excess Acreage, Valid and Enforceable?

We are persuaded that if the name of the third party were a private individual, and not the Bureau of Reclamation of the United States Government, the question would not even be argued. Peculiarly, there sometimes seems to be in the minds of many individuals some sort of guarantee of fairplay wherever an official of the government is in control. But there is no magic in a name. Governments can be, and often are, even more despotic than individuals, with the wrong person in public office. A rule by law is the only guarantee of freedom.

It is clear from a glance at the authorities we have hereinbefore referred to, and from an examination of the history of the United States, that the people of these United

States have, from the very commencement of their national existence, considered the protection of the right to own, possess and enjoy property as being not only of great importance, but also worthy of considerable repetition in the Supreme Law of both the United States and of this State.

In our view, this attitude is entirely reasonable and is, in fact, the only rational one that a people desirous of preserving their freedom could take, for on such a constitutional mandate depends, in the last analysis, life itself.

Statements that personal rights are superior to or different from property rights are so much rhetorical sophistry, and indeed sound like a peregrination of Marxian philosophy. Deprecatory asservations about the position of vested rights in our social order are either ignorant maunderings or malignant deception. Talk of freedom of the press, freedom of speech, freedom of person, freedom from unlawful search and seizure, etc., is just so much banal persiflage, if one is not protected in his ownership and right to control and enjoy his property.

Man is a land animal—without land he cannot live. He breathes air, eats animal and plant food, drinks water (and on occasion other fluids), and adds to his enjoyment of life with books, music, sports, drama and a variety of social intercourse. All of these matters by which man's life is sustained and his enjoyment of life is perpetuated are the subject of property ownership and vested rights. It requires very little effort to understand that if it is constitutional to take or damage, without just compensation, the land that a man has owned and improved for forty (40) years, or forty (40) months, or even forty days, then

it is just as constitutional to take, without just compensation, the bread, the meat and potatoes that a man has earned and lawfully possessed himself of to feed himself and his family. Today the spectacle of ruthless government seizure of food from the very mouths of starving Chinese should serve as a grim reminder of what power-mad governments can and will do if not curbed by a vigilant and militant public supporting the constitutional guarantees of their freedom.

On the scholastic or enjoyment side of life, we have innumerable examples of the workings of man's autocratic mind when unfettered by the sobering influence of constitutional safeguards for the right of property. Soviet ruthlessness in the destruction of priceless libraries containing works of science, art and religion, is common knowledge, and in bygone ages this same destruction of the recorded knowledge of man has been repeated many times.

Hitler, with his anti-Semitism and seizure of the art and book treasures of France, Cortez with his treachery to Montezuma and almost complete destruction of the historical records of the Aztecs, and Nebuchadressar (whom we now call Nebuchadnezzar) at Jerusalem, are a few far-spaced examples of how man's bigotry, unrestrained by basic law, has repeatedly crushed and blotted out the recorded knowledge of man slowly accumulated through the ages. Time after time treasures in the field of music and art have suffered the same fate. Neros have never been confined to any particular era of man's existence, nor to any special nation. When Cicero said that:

> "History is the witness of time, the light of truth and the life of memory",

he pointed out to us a valuable guide with which to search for and recognize the continuing propensities of man, equipped with autocratic power. From this same guide of recorded experience, we should also know that to break down our constitutional guaranties by loose reasoning in one respect means that the whole structure will soon become a flimsy sieve of meaningless words.

The examples thus given are but an infinitesimal fraction of the incidents history has recorded of governmental seizure of private property without just compensation. A good share of these seizures have been in the name of "public good", or "national welfare". Most of them have been by professed "do-gooders" whose visions of Utopia blind them to the rough and rugged path of reality which must be trod to reach even the fringes of their dream world. It is the old story of the impatient demagogue who will not discipline himself within due bounds, and who shrugs his shoulders at the broken principles and distorted views and the misery caused by his blunderings, and says, in order to excuse himself, "the end justifies the means".

The United States, under a rule of constitutional protection of all man's basic rights, has experienced greater progress toward the comfort and safety and freedom of the common man than was had in the previous two thousand years. If, at any time, our constitutional restrictions need altering, we have the means at hand to change our constitutions as we have already demonstrated twenty-two times nationally, and hundreds of times in the State of California. In our view, if it is constitutional and valid to say to a man who has acquired more than 160 acres of land:

> "you must sell your excess land at a figure controlled by us, or we will deny you any further governmental service",

then it is just as constitutional to say again:

> "You have reduced your acreage to 160, but we now demand that you reduce it to 16 acres, or we will render you no governmental service";

and again, still later, it would be constitutionally feasible to say:

> "You reduced your land to 160 acres, and again reduced it to 16 acres, and we now demand that you reduce it to 1.6 acres".

If it is thus constitutional to mandatorily compel the sale of excess land at an artificial price, then it is constitutional and valid for the government to say:

> "You own two newspapers; you are too powerful. Sell one of your newspapers at a price artificially controlled by us, or we will deny you any further paper stock from wood taken from the National forests";

and just as constitutionally might the government say:

> "You have two automobiles. Sell one at a price controlled by us or you will get no more gasoline, and in order to enforce this, all producers of petroleum from government land must sign an agreement that no one will receive gasoline for more than one automobile."

Just as easily, it might be two or four or six or eight head of cattle, horses, swine or sheep which would become the subject of such artificial government mandate dreamed up by the head of some other bureau, and sold by specious reasoning to a supine legislative body.

The argument might be advanced that there is no taking of property because the owner is allowed to sell it, but the fact remains that the price is controlled by artificial factors, and that the Secretary of Bureau can veto any price arrived at by appraisers. A complete examination of the various paragraphs controlling this limitation shows quite clearly that the owner has never had his day in Court for a fixation of price; that the long years of assessment payments to build up the property of District are not taken into account; and, further, there is no pretense that the land is being taken for public use after the payment of just compensation.

It is our opinion that the 160-acre limitation clauses of the contract, when attempted to be applied to property which was in private ownership before the contract was negotiated, and without the consent of the owner as in the case at bar, are contrary to and in violation of the Supreme Law of both the United States and the State of California, both as to the specific sections hereinbefore quoted and as to the whole spirit of our constitutional liberty; and, are, therefore, when attempted to be so applied, void and of no effect.

A careful examination and analysis of the whole contract and of the position of the parties, reveals no valid reason why this clause is not severable. Therefore, we see no reason why the contract as a whole need be vitiated. In all other respects it appears to be valid.

If the 160-acre limitation were to be held valid and actually applied, then, of course, by all the rules of fair conduct and decent, honest treatment, which are and must be the basis of all law governing a free people, petitioners should be entitled to exclusion.

However, since it is our opinion that the clause in question is, as to the property here involved, invalid and unenforceable, we are compelled to and do hold that petitioners cannot legally be denied their fair division of the water belonging to District, and that they are, therefore, not entitled to have the 939 acres of land excluded.

The writ is denied.

DATED: 21 November, 1951.

ARTHUR C. SHEPARD (Signed)
Judge of the Superior Court

Attorneys for respondents will draw findings and judgment.

ACS

Appendix C-3

In the Superior Court of the State of California in and for the County of Madera

No. 8497

Phillip Albonico and Jane E. Albonico, his wife,

Petitioners,

vs.

Madera Irrigation District, a corporation, and John M. Allen, C. A. Ridgeway, Allen T. Roberts, Dee V. Romans and John A. Franchi, Directors of the Madera Irrigation District,

Respondents.

JUDGMENT*

An alternative writ of mandate having issued herein on the 14th day of May, 1951, in the above entitled matter, and the same having come regularly before the Court for hearing on the 8th day of June, 1951, in the Superior Court of the State of California, in and for the County of Madera, pursuant to an order to show cause issued in connec-

*Clerk's Transcript pp. 34-36.

tion with said alternative writ of mandate, Green, Green, Plumley & Kuney, by Denslow Green and Kenneth A. Kuney, appearing as attorneys for petitioners, and David E. Peckinpah and L. N. Barber appearing as attorneys for respondents, and the Court having heard the testimony and having examined the proofs offered by the petitioners, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that the writ prayed for herein should be granted if the respondent Board of Directors of the respondent Madera Irrigation District continues to apply the present general plan of operation of the Madera Irrigation District; now, therefore, by reason of the law and findings aforesaid:

It is ordered, adjudged and decreed that if the general plan of operation of the Madera Irrigation District, as adopted and applied by the Board of Directors of the Madera Irrigation District, should continue to require compliance with the excess land conditions or limitations set forth in paragraphs 28, 29, or 30 of the Contract between the respondent and the United States (petitioners' Exhibit 4, herein) as a condition to petitioners receiving for all of their land their fair, ratable portion of the water distributed by the District for irrigation purposes, then, in that event, a peremptory writ of mandate shall issue from this Court directing and compelling the Board of Directors of the Madera Irrigation District to make its order vacating and setting aside its previous order of April 12, 1951, denying petitioners' petition for exclusion, and make its order excluding from the Madera Irrigation District the lands of petitioners, except as to 320 acres thereof.

It is further ordered, adjudged and decreed that if the general plan of operation of the Madera Irrigation District, as adopted and applied by the Board of Directors of the Madera Irrigation District, should supply all of the lands of petitioners their fair, ratable portion of the water distributed by the District for irrigation purposes, without imposition of the excess land conditions or limitations set forth in paragraphs 28, 29, or 30 of the Contract between the respondent and the United States (petitioners' Exhibit 4, herein), then, and in that event, the writ herein prayed for shall be denied.

It is further ordered, adjudged and decreed that petitioners have and recover of the respondents their costs and disbursements in this action, amounting to one hundred forty-nine and 45/100 Dollars.

Dated this 28th day of January, 1952.

Arthur C. Shepard,
Judge of the Superior Court

Filed January 29, 1952.

Appendix D-1

(Vol. 47 A.C. 701, 306 P. 2d 875 (1957).)

[L. A. No. 22761. In Bank. Jan. 24, 1957.]

THE SANTA BARBARA COUNTY WATER AGENCY, Respondent, v. ALL PERSONS AND PARTIES etc., Defendants; MAURICE A. BALAAM, et al., Appellants.

APPEAL from a judgment of the Superior Court of Santa Barbara County. Charles F. Blackstock, Judge.* Affirmed in part and reversed in part.

Proceeding by a county water agency to secure a judicial determination of the legality of the establishment of such agency and its member units and the validity of a master contract between the agency and the United States and member unit contracts entered into between the agency and city and county water districts. Judgment for plaintiff affirmed insofar as it declared validity of existence of agency and member units, and reversed insofar as judgment declared validity of contracts. [704]

SHENK, J.—This is an appeal from a judgment for the plaintiff Santa Barbara County Water Agency confirming the validity of a so-called "Master Contract" between the agency and the United States, acting by and through the Bureau of Reclamation of the Department of the Interior, and five so-called "Member Unit Contracts" between the plaintiff and each of five public bodies, namely, the city of Santa Barbara, and the Carpinteria, Summerland, Montecito and Goleta County Water Districts.

*Assigned by Chairman of Judicial Council.

The plaintiff as petitioner commenced this proceeding on February 8, 1950, pursuant to section 11.10 of Santa Barbara County Water Agency Act (Act 7303, Stats. 1945, p. 2780; amended by Stats. 1949, p. 18) to secure a judicial determination of the legality of the establishment of the agency and its member units, and the validity of the master contract and the five-member unit contracts entered into by the agency. Such a determination is required by article 35 of the master contract, by article 36 of each of the member unit contracts, and by federal law (Omnibus Adjustment Act of 1926, §46, 44 Stats. 649, 650, 43 U.S.C. §423e). It is a special proceeding *in rem* and summons was by publication. It was brought against all persons having or claiming to have any interest in the formation of the agency, in the proceedings of the various contracting entities leading to the execution of the contracts, in the operation of the proposed contracts and in the property affected thereby. A final judgment will foreclose further inquiry into the matters to which the judgment properly relates, and within its legitimate issues it will be binding on the world at large. (*Ivanhoe Irr. Dist.* v. *All Parties*, *ante*, [1]p. —— [—— P. 2d ——] and cases there cited.) The answering defendants are Maurice A. Balaam, Ted R. Holden, William G. Sudden, W. G. Moore, R. E. Sudden, [705] Charles E. Sudden and L. H. Crandall. The default of all other defendants was duly entered on May 1, 1950.

The petition alleged six causes of action each seeking the confirmation of one of the contracts involved. The defendants demurred to each count on both general and

[1]Advance Report Citation: *Ante*, p. 603 [Herein p. 1].

special grounds. The demurrers were overruled. The defendants' answer denied the validity of the formation of the plaintiff agency, certain proceedings of the board of directors of the agency leading to and including the signing of the master contract, the master contract itself, the proceedings of the respective boards of directors of the different member units leading to and including the signing of the respective member unit contracts and the validity of each of the member unit contracts.

The defendants also pleaded nine affirmative defenses to each of the causes of action. In substance it is alleged: (1) that provisions in the member unit contracts authorized by the Santa Barbara County Water Agency Act, whereby the agency will levy ad valorem taxes on all property in the agency to establish a fund from which contributions will be made to the member units, violate the constitutional provisions against legislative gifts and authorization of the imposition of local taxes by special legislation (art. IV, §13 and art. XI, §12 of the state Constitution); (2) that the Santa Barbara Water Agency Act purports to give the agency the power to levy ad valorem taxes on all property in the city of Santa Barbara and the various county water districts in violation of the constitutional prohibition of the imposition of taxes on individuals or property within public corporations for municipal purposes (art. XI, §12 of the state Constitution); (3) that the Santa Barbara Water Agency Act is unconstitutional in that it subjects the defendants to taxation and assessment on lands which cannot possibly be benefited from the construction of the project; (4) that any determination, legislative or otherwise, that the defendants' lands will be benefited by the

project is arbitrary and contrary to any rational view based on evidence of investigation; (5) that the contracts provide for no distribution of water to parcels owned by a single person in excess of 160 acres, but that the excess lands are nevertheless subject to taxation for project purposes; (6) that the contracts are impossible of performance and lacking in consideration; (7) that the contracts (except the city of Santa Barbara Member Unit Contract) purport to prohibit the exclusion from the district of lands not benefited by the project, without the consent of the Interior; [706] that section 23202 of the Water Code condones such provisions, and that both the contracts and section 23202 violate the Fourteenth Amendment of the federal Constitution and constitute an unlawful delegation of legislative power under the state Constitution (art. IV, §1); (8) that the provisions of section 9(c)(2) and 9(e) of the Reclamation Project Act of 1939 (53 Stats. 1187, 43 U.S.C. §485), pursuant to which the contracts purport to have been executed, constitute an unconstitutional delegation of power to the Secretary of the Interior, and (9) that those provisions of the contracts which provide that the United States is entitled to all waste, seepage, and return flow water derived from water supplied under the contracts to the member units through the agency, are invalid under the federal reclamation laws and the law of the state which make such waters appurtenant to the lands irrigated.

The agency demurred generally to each of the affirmative defenses and the demurrers were sustained.

The causes were tried on November 14, 1951, and a judgment was entered on October 22, 1952. The judgment declared (a) the legality of the organization and existence

of the agency, the city of Santa Barbara and the four county water districts, (b) the due execution of the six contracts, (c) the lawfulness of the contracts, and (d) that the defendants had waived and were estopped from asserting the illegality or unconstitutionality of the agency and of the Santa Barbara County Agency Act. The defendants have appealed from all portions of the judgment. The Attorney General of the State of California has appeared as amicus curiae in support of the judgment, and the Di Giorgio Fruit Corporation has appeared as amicus curiae asserting the invalidity of the contract.

The county of Santa Barbara is situated in a semi-arid portion of Southern California. It has no common source of water supply that can serve the entire county but contains numerous non-contiguous watersheds. The county has grown greatly in population and developed an economy requiring full utilization and development of all available water supplies. For many years the county made investigations and engineering surveys of its water resources utilizing private, public and United States engineers for that purpose. Pursuant thereto, in June, 1945, a comprehensive water development plan for the county was submitted by the Bureau of Reclamation, and the Santa Barbara County Water Agency was formed by the Legislature in 1945 to carry out the plan. The agency's boundaries are coextensive with those of the [707] county and the lands served by all member units lie within its boundaries.

Commencing in 1946 the agency began negotiations for a water supply from the Cachuma Unit of the Santa Barbara County Project, described in House Document Number 587 of the 80th Congress, 2d Session of April 1, 1948. That

document reveals that the Cachuma Unit will consist of the Cachuma Dam and Reservoir on the Santa Ynez River, the Tecelote Transmountain Diversion Tunnel and the South Coast Conduit; that it is to be constructed, operated and maintained by the Bureau of Reclamation, pursuant to federal reclamation laws; that the water to be diverted for purposes of the project is unappropriated water to be appropriated under state law, and that the estimated cost of construction of the Cachuma Unit, exclusive of irrigation distribution works, is $28,610,000. This amount is to be reimbursed to the United States by payments for water in excess of the costs of upkeep, operation and maintenance over a period calculated not to exceed 50 years. It is apparent that what we have said in *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [1]p. —— [—— P.2d ——], is equally true in the present case, namely, that the relationship between the parties is that of debtor and creditor, contemplating a state project to be eventually owned and operated locally, and that the domestic water herein appropriated for beneficial use must be and can only be devoted to a use consistent with the purpose of the appropriation and the trust relationship existing between the United States and the water users entitled to service within the agency.

The contracts in question are for the furnishing of domestic water by a purveyor thereof at a stipulated price. They do not involve the construction of distribution systems, as in the Ivanhoe and Madera cases. (*Ivanhoe Irr. Dist.* v. *All Parties, ante,* [1]p. —— [—— P.2d ——]; *Madera Irr. Dist.* v. *All Persons, Ante,* [2]p. —— [—— P.2d

[1]Advance Report Citation: *Ante*, p. 603 [Herein p. 1].
[2]Advance Report Citation: *Ante*, p. 685 [Herein p. 139].

——].) The master contract contemplates a supply of water for irrigation, municipal, domestic, industrial and other uses to be furnished and delivered to each member unit of the agency for a period of 40 years, specifying delivery points; time of delivery and maximum rates for various classes of water. The agency is charged with the payments for all water delivered to member units. Provisions other than those specifically objected to by the defendants in their affirmative defenses provide for [708] the storage of water, availability of excess water, responsibility for water shortage, the recognition by the bureau of existing water rights, transfers of water by member units, defaults in payments, inspection of books and records by the bureau and other provisions not here material.

The member unit contracts, identical in form, are in general repetitions of the master contract except as to the contracting parties and the changes made necessary by the substitution thereof. Payments for water to be delivered are to be made by member units to the agency. Those features of the master contract which are objected to are contained also in each of the member unit contracts.

A preliminary question relates to the validity of the Santa Barbara Water Agency Act and the existence of the contracting entities. The contracts require that the agency and the member units initiate legal proceedings which seek not only the confirmation of the contracts but also the confirmation of the legality of the organization of the agency and the member units. As previously noted the defendants contend in their first affirmative defense that the act violates section 31 of article IV of the Constitution, which prohibits legislative authorization for the donation

of public funds. Section 10.2 of the act provides in part that the agency shall have the power to expend any or all of the funds or contributions in aid of: (a) the construction or payment of the cost of works; (b) the purchase or obtaining of water or a water supply; and (c) the payment of any liability "assumed as principal, guarantor, or underwriter on an indebtedness in connection with such construction, payment, purchase or obtaining; if such works are constructed or said water or water supply is obtained for or on behalf of the agency or its member units. . . ." In accordance with the above and other provisions of the act (see § 5.1) the agency has agreed in its contracts to pay for water furnished to member units to the extent of $100,000 annually, prorated among the member units in accordance with their respective annual payments to the agency. This, it is contended, constitutes a gift of public funds and a violation of section 31, article IV.

It is the general rule that a contribution from one public agency to another for a purely local purpose of the donee agency is in violation of the constitutional prohibition, but that such a contribution is legal if it serves the public purpose of the donor agency even though it is beneficial to local purposes of the donee agency. (*Pacific Mutual Life Ins. Co.* v. *County of San Diego,* 112 Cal. 314 [41 P. 423, 44 P. 571].) Thus in *City of Oakland* v. *Garrison,* 194 Cal. [709] 298 [228 P. 433], payment by the county of Alameda to the city of Oakland to improve a street entirely within the city was held to be proper where the county board of supervisors found it would be for the general good of the county. And in *County of Los Angeles* v. *Riley,* 6 Cal.2d 625 [59 P.2d 139, 106 A.L.R. 903], it was

held that the state could impose a statewide tax on motor vehicles and then apportion some of the proceeds to the counties for local use because a statewide public purpose was being served. "The determination of what constitutes a public purpose is primarily a matter for legislative discretion [citations] which is not disturbed by the courts so long as it has a reasonable basis [citations]. This court has frequently upheld the expenditure of funds by the state, or by its subdivisions for the benefit of individuals as for a 'public purpose' and hence not within section 31 of Article IV." (*County of Alameda* v. *Janssen*, 16 Cal.2d 276 at 281 [106 P.2d 11, 130 A.L.R. 1141]; see also *County of Los Angeles* v. *La Fuente*, 20 Cal.2d 870, 876 [129 P.2d 378]; *California Emp. Stab. Com.* v. *Payne*, 31 Cal.2d 210, 216 [187 P.2d 702].)

That the conservation and beneficial use of the domestic waters of this state serve a public purpose is without question. (Const., art. XIV, § 3.) The legislative determination that those provisions of the act whereby the agency could expend funds in assistance to member units in furtherance of the public purposes served by the act is entitled to a strong presumption of constitutionality and nothing appears herein to dispel that presumption. The financial assistance of the agency in making the overall plan economically feasible to the member units is a proper means of effecting the public purpose for the general good of the whole of the area served by the agency.

It is next contended by the defendants in both their first and second affirmative defenses that the act creating the agency is in violation of article XI, section 12 of the Constitution, which forbids the Legislature to levy taxes on

public corporations, or upon the property thereof, "for county, city, town, or other municipal purposes but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes. . . ."

The limitations of section 12 do not prevent the Legislature from authorizing a district to impose taxes for a state purpose (*Joint Highway Dist. No. 13* v. *Hinman*, 220 Cal. 578, 588 [32 P. 144], nor for a purpose that transcends the boundaries of the various municipalities that may be included [710] within the limits of a larger district (*Henshaw* v. *Foster*, 176 Cal. 507, 511 [169 P. 82]; *Pixley* v. *Saunders*, 168 Cal. 152 [141 P. 815].) In view of the declaration of section 3, article XIV of the Constitution, that "because of conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare . . .," it is contended by the agency that it serves more than a "county, city, town or other municipal purpose" within the meaning of section 12, and that the constitutional prohibition is therefore inapplicable in the present situation. This contention has support in the legislative and decisional law of the state. In spite of numerous enactments for the conservation of water wherein the power to levy taxes and assessments was conferred on an agency of the state, and in numerous cases where the constitutionality of such

enactments was questioned on various grounds, no case is referred to or has been found wherein a specially created district with taxing powers similar in scope to those of the present agency has been held to be unconstitutional by reason of section 12. *(Cf.* Municipal Home Rule in California, John C. Peppin, 34 Cal.L.Rev. 644.)

It is also contended that section 12 of article XI invalidates the power given the agency by section 10.3 of the act by levying a special tax solely within the defaulting member unit to cure the defaulted financial obligation owing the agency. But a larger district, in assessing benefits, can establish zones for that purpose in different portions of the district. (See *Los Angeles County Flood Control Dist.* v. *Hamilton,* 177 Cal. 119, at 128 [169 P. 1028].) The levy prescribed by section 10.3 of the act is a protection for the agency, is not local as to the member units but transcends their boundaries and does not violate the "municipal purpose" clause of section 12 of article XI. *(Pixley* v. *Saunders, supra,* 168 Cal. 152; *Pasadena* v. *Chamberlain,* 204 Cal. 653 [269 P. 630]; *County of Los Angeles* v. *Hunt,* 198 Cal. 753 [247 P. 897].)

It is also contended, although not specifically set out in any of the affirmative defenses, that the special enactment of the Santa Barbara County Water Agency Act is in violation of section 6, article XI of the Constitution, which provides in part: "Corporations for municipal purposes shall not be created by special laws; but, the Legislature shall, by general [711] laws, provide for the incorporation, organization and classification, in proportion to population, of cities and towns. . . ." The question is whether

the agency has been created for "municipal purposes" within the meaning of the above section.

It would appear from a reading of the section that the term "municipal purposes" has reference to the purposes of "cities and towns." Such a construction was applied by the court in *Turlock Irr. Dist.* v. *White*, 186 Cal. 183 [198 P. 1060, 17 A.L.R. 72]. There the court had before it the meaning of "municipal corporation" as employed in section 1 of article XIII of the Constitution. In defining that expression as not to include an irrigation district the court referred to section 6, article XI, and stated at page 188: "At the same election article XI, section 6, was amended by the people. This section restricts the power of the legislature in the formation of municipal corporations, to providing by general law for their formation, and prohibits the formation of such corporation by special statute. That section uses the term 'municipal corporation' as synonymous with 'cities and towns.'" (See also *Laguna Beach County Water Dist.* v. *Orange County*, 30 Cal.App.2d 740, 743 [87 P.2d 46]; *People* v. *Rinner*, 62 Cal.App. 747, 751 [199 P. 1066].)

Generally it is true that where the scope of a project transcends the boundaries of a municipality it ceases to be for a municipal purpose. (See *Pixley* v. *Saunders, supra*, 168 Cal. 152; *County of Los Angeles* v. *Hunt, supra*, 198 Cal. 753; *Gadd* v. *McGuire*, 69 Cal.App. 347 [231 P. 754].) In *Pasadena* v. *Chamberlain, supra*, 204 Cal. 653, involving the constitutionality of the Metropolitan Water District Act with respect to article XI, section 6, this court held that in the combined operations of several municipalities

under the act, "the municipalities engaged therein could not be held to be engaged in the conduct of a merely municipal affair." A similar conclusion was reached in *Van de Wiele* v. *Pridham*, 33 Cal.App. 252, 259 [164 P. 1136], relative to drainage ditches constructed partly within a city under the Drainage Act of 1903; and in *Pasadena Park Imp. Co. v. Lelande*, 175 Cal. 511 [166 P. 341], relating to a protection district (Stats. 1895, P. 248) to protect against floods and including city lands. Numerous cases have established that special legislation in the creation of various types of districts dealing with water problems is not in contravention of the "municipal purpose" clause of section 6 of article XI. (*People v. Levee Dist No. 6*, 131 Cal. 30 [63 P. 676] [levee district]; *People* v. *Sacramento Drainage Dist.*, 155 Cal. 373 [103 P. 207] [drainage district]; [712] *Reclamation District No. 70 v. Sherman*, 11 Cal.App. 399 [105 P. 277], and *Peterson* v. *Board of Supervisors*, 65 Cal.App. 670 [225 P. 28] [reclamation districts]; *Barber* v. *Galloway*, 195 Cal. 1, 13 [231 P. 34] [combined irrigation, drainage and water distribution district, i.e., Palo Verde Irrigation District].)

It is noted that the cases have made distinctions between the meaning to be given to the terms "municipal corporations" or "municipal purposes," depending upon the particular section of the Constitution to which the definition relates. (See dissenting opinion by Chief Justice Beatty in *County of San Mateo v. Coburn*, 130 Cal. 631, at page 637 [63 P. 78, 621].) It is concluded that the agency is not performing a purely municipal function within the meaning of section 6 of article XI and the decisional law thereon.

The invalidity of the act is also urged by the defendants in their third and fourth affirmative defenses on the ground, generally, that the only lands receiving benefits thereunder are those within the member units; that considerable portions of land within the boundaries of the agency are not within any member unit and therefore are not benefited by the act, and that the levy of an ad valorem tax on all lands within the agency authorized by the act is a taking of property without due process of law. This contention has often been litigated under similar circumstances. The basic question relates to a proper finding of a benefit conferred on lands not directly served. In the present case the agency was created by a special act of the Legislature wherein it was determined what lands were to be assessed for the benefit of the public improvement. In such circumstances "the property owners are not entitled to a hearing on the question of benefits to the land included within the district for they are conclusively presumed to have been heard through their representatives in the legislature." (*Orosi Public Utility Dist., In re*, 196 Cal. 43, 50 [235 P. 1004].). Such a determination, however, cannot be arbitrary, capricious or without factual basis.

The basis of proper legislative determination of benefits conferred on all lands within a district is dealt with exhaustively in *Los Angeles County Flood Control Dist.* v. *Hamilton, supra*, 177 Cal. 119, and that case is determinative of the contentions in the present case. These claims of lack of direct benefit of all lands within the district were the same for all material purposes as those urged by the defendants in their third and fourth affirmative defenses. Beginning at page 123 this court stated: "The

warrant and justification for charging the cost of such improvement upon designated [713] lands is to be found, in theory at least, in the benefit to be derived by the lands assessed from the contemplated work. (*Reclamation Dist. v. Birks*, 159 Cal. 233, 241 [113 P. 170].) . . . The fixing of the district which is to bear the expense of a local improvement, and the mode in which such expense is to be borne and distributed, are primarily legislative questions. . . . But since the imposition of such costs finds its ground of sanction in the benefits conferred upon the lands charged, it may well be that the legislative conclusion should not be upheld where the court can see that it is contrary to any rational view of the facts, and that lands have been included that 'plainly could not by any fair or proper view of the facts be benefited.' . . .'' The court proceeded to examine the facts, noting that the district contained ''several separate and unconnected watersheds''; that it ''comprised a considerable area of mountainous land''; that much of the district lay ''above the plane of any flood waters which are to be anticipated,'' and that other lands were beyond the area of possible floods. Conceding that such lands could not be directly benefited, the court held that ''the benefit which would justify the inclusion of land within the district need not be so direct and immediate as is assumed in the argument of counsel opposing the validity of the act.'' In referring to numerous cases involving problems closely related to the present one, the court concluded that an ''examination of these cases will show that the courts have regarded an incidental or indirect benefit as sufficient to justify the imposition of a part of the burden of the improvement. Such indirect

benefit may result from the improvement of neighboring and surrounding land, and the consequent increase in the value of all land within the district. . . . The proper maintenance of the harbors by protecting them from flood damage, the preservation of the means of communication between the different parts of the district by guarding against damage to highways and bridges . . . these are purposes whose execution may well be of substantial and immediate benefit to all of the lands included within the district." As to the imposition of an ad valorem tax, the court had this to say, beginning at page 124: "It is thoroughly settled that the legislature may apply the *ad valorem* method of assessment, without any judicial inquiry into, or determination of, the extent of benefits. Recognizing that absolute equality cannot be attained under any system of taxation or assessment, the courts hold that constitutional requirements are satisfied by that approximation to equality which may fairly be thought to result from an assessment of the cost upon the property benefited in proportion to its [714] ascertained value. (*Burnett* v. *Mayor, etc. of Sacramento*, 12 Cal. 76, 84 [73 Am.Dec. 518]; *In re Madera Irr. Dist.*, 92 Cal. 296 [27 Am.St.Rep. 106, 14 L.R.A. 755, 28 P. 272, 675]; *Thomas* v. *Pridham*, 171 Cal. 98, 104 [153 P. 933]; *Fallbrook Irr. Dist.* v. *Bradley*, *supra* [164 U.S. 112 (17 S.Ct. 56, 41 L.Ed. 369)].)"

From the foregoing it is apparent that the inclusion of all of the lands within the agency and the imposition of an ad valorem tax on all of these lands on the ground that they would benefit by the operation thereof was a matter properly determined by the Legislature. It is noted that

among the purposes for which the agency was created are "controlling and conserving storm, floor and other surface waters for any beneficial use and for the protection of life and property in said district." (Stats. 1945, P. 2780.) Those indirect benefits referred to in *Los Angeles Flood Control District* v. *Hamilton, supra,* and conferred upon all of the lands within the agency, appear to be well within the legitimate scope of the act.

In their fifth affirmative defense the defendants raise issues which have been discussed and disposed of in *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [1]p. —— [—— P.2d ——], and in *Madera Irr. Dist.,* v. *All Persons, ante,* [2]p. —— [——P.2d ——]. In accordance therewith it is concluded that the excess land provisions of the contracts involved here, which are substantially the same as those in the Ivanhoe and Madera contracts, are inapplicable and if not declared to be so would deprive the landowners of the member units of their property rights without due process of law and constitute a denial of the equal protection of the laws; that the United States is acting in its proprietary capacity as a purveyor of the domestic waters of the state to the agency and its member units; that it is bound to observe and comply with the laws of the state with reference to the rights of the water users being served, and that the contract is invalid insofar as it, by implication or otherwise, provides that the United States can arbitrarily cause to be discontinued the distribution of water to those for whose benefit the right to the water was acquired in the first instance.

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[1]Advance Report Citation: *Ante,* p. 603 [Herein p. 1].
[2]Advance Report Citation: *Ante,* p. 685 [Herein p. 157].

Numerous other grounds for the invalidity of the contracts are asserted. It is stated in the defendants' sixth affirmative defense that the contracts are lacking in consideration and are impossible of performance, in their seventh and eighth [715] affirmative defenses that provisions in the contracts authorized by the Water Code (§23202) and the Reclamation Act of 1939 (§§ 9[c] [2], 9[e], 53 Stats. 1187) delegate legislative power to the Secretary of the Interior in violation of the Fourteenth Amendment of the federal Constitution and provisions in the state Constitution (art. IV, § 1), and in the ninth affirmative defense that the provisions entitling the United States to all waste, seepage and return flow are invalid. These contentions are insufficiently supported when considered with what has been said herein and in the Ivanhoe and Madera cases as to the matters concerning which the parties may properly contract.

Questions have been raised as to the sufficiency of certain proceedings leading to the execution of the contracts and the notice of elections for their confirmation. Such questions need not be determined in this case for the reason that upon a submission of any further proposed contracts the alleged defects need not recur.

The attorney general appearing as amicus curiae in behalf of the State of California in support of the judgment, questions the right of the appellants to prosecute this appeal. It appears that the notice of appeal was filed some 35 days after entry of the judgment. Section 11.10 of the Santa Barbara County Water Agency Act provides in part that any "party may appeal at any time within 30 days after the entry of the judgment." It is contended that the

failure to appeal within the time specified requires that the appeal be dismissed by the court of its own motion, even if no objection has been made by any party to the proceeding. (*In re Horowitz*, 33 Cal.2d 534, 537 [203 P. 2d 513]; *Estate of Hanley*, 23 Cal.2d 120, 123 [142 P.2d 423, 149 A.L.R. 1250].)

The appellants assert that the 30-day period within which an appeal "may" be taken in pursuance of section 11.10 of the act is permissive and not mandatory. Section 2(i) of the act provides that "may" is permissive and "shall" is mandatory. Section 11.10 of the act, after setting forth the special provision for the time in which to appeal, states further that the "rules of pleading and practice not inconsistent with the provisions of this section, are applicable to all actions or proceedings provided for by this section." Rule 2(a) of the Rules on Appeal provides that "Except as otherwise specifically provided by law, notice of appeal shall be filed within 60 days from the date of entry of the judgment. . . ."

The appellants contend that as the special provision is permissive only, it is not inconsistent with the Rules on Appeal [716] and that the latter should control. In support thereof they refer to the following declaration in section 11.10 of the act: "In a contest provided for by this Section, the court shall disregard any irregularity or omission which does not affect the substantial rights of the parties." They claim that no substantial right of the respondent has been adversely affected. Furthermore, it is argued, that when the law is doubtful as to the right of appeal, the cause will be heard on its merits. (*People* v. *Bryant*, 207 Cal. 450, 452 [278 P. 1025]; *San Francisco* v.

Certain Real Estate, 42 Cal. 513.) In *People* v. *Bank of San Luis Obispo,* 152 Cal. 261, it is said at page 264 [92 P. 481]: "The right of appeal is remedial and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment."

The intent of the so-called "permissive" appeal provisions of section 11.10 at best is doubtful and in accordance with the foregoing no good reason appears why the appeal should not be entertained.

It is concluded that the judgment insofar as it declares the validity of the Santa Barbara Water Agency Act and the existence of the agency and its member units must be and hereby is affirmed. Insofar as the judgment confirms and declares valid the master contract and the five member unit contracts it is reversed, the appellants to recover costs on appeal.

Schauer, J., Spence, J., and McComb, J., concurred.

GIBSON, C. J., Concurring and Dissenting.—I concur in the views expressed in the portion of the majority opinion which relates to the validity of the Santa Barbara Water Agency Act and the existence of the agency and its member units. For the reasons stated in my dissenting opinion in *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [1]p. —— [—— P.2d ——], I disagree with the majority opinion insofar as it reverses the judgment of the trial court.

Traynor, J., concurred.

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[1]Advance Report Citation: *Ante,* p. 653 [Herein p. 64].

CARTER, J., Dissenting.—This is a companion case to *Ivanhoe Irr. Dist.* v. *All Parties, ante,* [1]p. —— [—— P.2d ——], and for the reasons stated in my dissenting opinion in that case, I would affirm the judgment of the trial court here. [717]

[1]Advance Report Citation: *Ante,* p. 603 [Herein p. 1].

Appendix D-2

In the Superior Court of The State of California
In and for the County of Santa Barbara

No. 37417

The Santa Barbara County Water Agency, a public district and body politic and corporate,

Plaintiff,

vs.

The State of California, All Property Owners in Said Agency, All Residents in Said Agency, All Registered Voters in Said Agency, and All Persons Interested,

Defendants.

JUDGMENT*

In this cause the default of all the defendants, except the defendants Maurice A. Balaam, Ted R. Holden, William C. Sudden, W. G. Moore, R. E. Sudden, Charles E. Sudden and L. H. Crandall (hereinafter referred to as the "Answering Defendants") was duly entered in order of the Court May 1, 1950. Thereafter this cause came on regularly for hearing before the Court on November 14,

*Clerk's Transcript pp. 750-755.

1951, sitting without a jury, the Honorable Charles F. Blackstock, Judge of the Superior Court, presiding, Plaintiff appearing by Vern B. Thomas, Esquire, District Attorney of said County and Lawrence M. Parma, Deputy District Attorney of said County, and the Answering Defendants appearing by Sherman Anderson, Esquire, and W. P. Butcher, Esquire. And evidence having been introduced and the cause submitted to the Court for decision on Plaintiff's Complaint and that portion of the Answer of the Answering Defendants filed August 18, 1950, from pages 1 to 12 inclusive (but exclusive of the affirmative defenses alleged in pages 13 to 26 inclusive) as said Answer is amended with respect to the Answer to the Second, Third, Fourth and Fifth Causes of Action in Plaintiff's Complaint by pages 1 and 2 of an "Amendment" to said Answer verified December 4, 1950 and filed on or about January 2, 1951 (but exclusive of the First and Ninth Affirmative Defenses contained at pages 2 to 5 inclusive of said "Amendment") and as said Answer was further amended with respect to said Answer to said Second, Third, Fourth and Fifth causes of action in said Complaint by an oral stipulation entered into at the time of trial whereby said portions of said Answer were amended to include the allegation by interlineation on the face of said Answer that the elections referred to in said causes of action were not carried on or conducted in the manner required by sections 31157, 31407, and 31391 of the Water Code of the State of California, and the Court having duly considered the cause and being fully advised in the premises, and the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law;

Now, Therefore, by Reason of The Law and The Findings of Fact Aforesaid It Is Hereby Ordered, Adjudged and Decreed as Follows:

I.

That all of the Defendants named in the Complaint and Summons herein have each and all been duly served with process and summoned to appear and answer the Complaint of the Plaintiff herein by the publication of said summons pursuant to the order of the Court and that such publication was in the form and manner and was published for the time and in the manner prescribed by law, and that the legal time for answer has since expired and no Defendants having answered herein except said Answering Defendants, the default of all parties defendant except said Answering Defendants has been duly entered according to law.

II.

That this action is lawfully presented as an action in rem and this Court has jurisdiction of the subject matter and of all parties hereto.

III.

That the Plaintiff, the Santa Barbara County Water Agency, now is and continuously at all times since September 15, 1945, has been a legal and valid district created, organized and existing under and by virtue of the Santa Barbara County Water Agency Act (1945 California Statutes, Chapter 1501, 1949 California Statutes, Chapter 12) and is lawfully and constitutionally vested with all the powers, authorities and prerogatives conferred by said Act.

IV.

That the aforesaid Santa Barbara County Water Agency Act as enacted by 1945 California Statutes, Chapter 1501, and as amended by 1949 California Statutes, Chapter 12, and each and every part thereof is valid and legal and does not contravene nor violate any provision of the Constitution of the United States of America or the Constitution of California.

V.

That on and prior to September 12, 1949 and continuously ever since date the City of Santa Barbara has been a municipal corporation, and the Montecito County Water District, the Goleta County Water District, the Summerland County Water District and the Carpinteria County Water District each have been a county water district, said city and said county water districts each being duly, validly and legally organized, established and existing under and by virtue of the laws of the State of California.

VI.

That a certain contract entitled "Contract For The Furnishing of Water to Member Units of Santa Barbara County Water Agency," executed by the Plaintiff and the United States of America, acting by and through Richard L. Boke, Regional Director, Region 2, Bureau of Reclamation, United States Department of the Interior, dated September 12, 1949, a true copy of which is attached to the Complaint here as Exhibit "A" (sometimes called the "Master Contract") was duly executed on September 12, 1949 by the respective parties thereto, and that said Master Contract is, and that each and every of the terms and

provisions thereof are, lawful and valid and within the lawful power of the Santa Barbara County Water Agency and the United States of America to make, enter into and carry out, and that all proceedings leading up to and including the execution of said contract have been taken, had and performed in the manner required by law and that said contract is valid and legally binding upon, against and in favor of said Santa Barbara County Water Agency and the United States of America, and is the lawful, legal and binding act of each of the parties thereto.

VII.

That the certain contract entitled "Contract For Furnishing Water to Carpinteria County Water District", a true copy of which is attached to the Complaint herein as Exhibit "E", dated September 12, 1949, and executed by and between said Agency and the Carpinteria County Water District is, and that each and every of the terms and provisions thereof are, lawful and valid and within the lawful power of said Agency and said Carpinteria County Water District to make, enter into and carry out, and that all proceedings leading up to and including the execution of said contract last mentioned have been taken, had and performed in the manner required by law and that said contract last mentioned is valid and legally binding upon, against and in favor of said Agency and said Carpinteria County Water District, and is the lawful, legal and binding act of each of the parties thereto.

VIII.

That the certain contract entitled "Contract for Furnishing Water to Goleta County Water District," dated

September 12, 1949, a true copy of which is attached to the Complaint as Exhibit "F", and executed by and between said Agency and the Goleta County Water District is, and that each and every of the terms and provisions thereof are, lawful and valid and within the lawful power of said Agency and said Goleta County Water District to make, enter into and carry out, and that all proceedings leading up to and including the execution of said contract last mentioned have been taken, had and performed in the manner required by law and that said contract last mentioned is valid and legally binding upon, against and in favor of said Agency and said Goleta County Water District, and is the lawful, legal and binding act of each of the parties thereto.

IX.

That the certain contract entitled "Contract for Furnishing Water to Montecito County Water District", a true copy of which is attached to the Complaint as Exhibit "G", dated September 12, 1949, and executed by and between said Agency and the Montecito County Water District is, and that each and every of the terms and provisions thereof are, lawful and valid and within the lawful power of said Agency and said Montecito County Water District to make, enter into and carry out, and that all proceedings leading up to and including the execution of said contract last mentioned have been taken, had and performed in the manner required by law and that said contract last mentioned is valid and legally binding upon, against and in favor of said Agency and said Montecito County Water District, and is the lawful, legal and binding act of each of the parties thereto.

X.

That the certain contract entitled "Contract for Furnishing Water to Summerland County Water District", a true copy of which is attached to the Complaint as Exhibit "H", dated December 8, 1949, and executed by and between said Agency and the Summerland County Water District is, and that each and every of the terms and provisions thereof are, lawful and valid and within the lawful power of said Agency and said Summerland County Water District to make, enter into and carry out, and that all proceedings leading up to and including the execution of said contract last mentioned have been taken, had and performed in the manner required by law and that said contract last mentioned is valid and legally binding upon, against and in favor of said Agency and said Summerland County Water District, and is the lawful, legal and binding act of each of the parties thereto.

XI.

That the certain contract entitled "Contract for Furnishing Water to City of Santa Barbara", a true copy of which is attached to the Complaint as Exhibit "D", dated September 12, 1949, and executed by and between said Agency and the City of Santa Barbara is, and that each and every of the terms and provisions thereof are, lawful and valid and within the lawful power of said Agency and said City of Santa Barbara to make, enter into and carry out, and that all proceedings leading up to and including the execution of said contract last mentioned have been taken, had and performed in the manner required by law and that said contract last mentioned is valid and legally

binding upon, against and in favor of said Agency and said City of Santa Barbara, and is the lawful, legal and binding act of each of the parties thereto.

XII.

That the organization and existence of said Agency, City of Santa Barbara and said County Water Districts and each of them and the validity, legality and constitutionality of the powers, authority and prerogatives vested in them by the laws of the State of California is hereby confirmed and approved.

XIII.

That each of said contracts aforesaid, and each and every term and provision thereof, is and are in all respects valid and authorized by law and said contracts, and each and every term and provision thereof is and are in all respects a valid, legal and subsisting contract, binding upon, against and in favor of the respective parties thereto, and said contracts and each and every term and provision thereof, and each and every act of the respective parties thereto, leading up to and including the executions and deliveries thereof, is hereby confirmed, approved and adjudged to be valid, legal and constitutional.

XIV.

That said Answering Defendants and each of them has waived and is estopped from asserting the illegality or unconstitutionality of said Plaintiff and of said Santa Barbara County Water Agency Act and said Santa Barbara County Water Agency Act as amended.

Done in open Court this 20th day of October, 1952.

s/ Chas. F. Blackstock
Judge of the Superior Court

Entered October 22nd, 1952, in Judgment Book A-21, Page 333.

(Endorsed) Filed Oct. 22, 1952.
J. E. LEWIS, County Clerk
By s/ Pearl A. Barr, Deputy Clerk

Appendix E

RECLAMATION ACT OF 1902
(32 Stat. 388)

Sec. 5 (32 Stat. 389, 43 U.S.C. sec. 431):

. . . No right to the use of water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

Sec. 6 (32 Stat. 689, 43 U.S.C. secs. 491, 498):

That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation

shall remain in the Government until otherwise provided by Congress.

Sec. 8 (32 Stat. 390, 43 U.S.C. secs. 372, 383):

That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

Appendix F

OMNIBUS ADJUSTMENT ACT OF 1926
(44 Stat. 636).

Sec. 46 (44 Stat. 649, 43 U.S.C. sec. 423e):

No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further

provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided further*, That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment.

Appendix G

ACT OF AUGUST 26, 1937
(50 Stat. 844).

Sec. 2 (50 Stat. 850):

That the $12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028, at 1038), entitled "An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided,* That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and

semi-arid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further,* That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power.

Appendix H

RECLAMATION PROJECT ACT OF 1939
(53 Stat. 1187).

Sec. 9(c) (53 Stat. 1195, 43 U.S.C. sec. 485h(c):

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ percentum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate

share of the construction investment at not less than 3 percentum per annum, and such other fixed charges as the Secretary deems proper: *Provided further*, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans made pursuant to the Rural Electrification Act of 1936 and any amendments thereof. Nothing in this subsection shall be applicable to provisions in existing contracts, made pursuant to law, for the use of power and miscellaneous revenues of a project for the benefit of users of water from such project. The provisions of this subsection respecting the terms of sales of electric power and leases of power privileges shall be in addition and alternative to any authority in existing laws relating to particular projects. No contract relating to municipal water supply or miscellaneous purposes or to electric power or power privileges shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.

Sec. 9(d) (53 Stat. 1195, 43 U.S.C. sec. 485h(d):

No water may be delivered for irrigation of lands in connection with any new project, new division of a project, or supplemental works on a project until an organization, satisfactory in form and powers to the Secretary, has entered into a repayment contract with the United States, in a form satisfactory to the Secretary, providing among other things—

(1) That the Secretary may fix a development period for each irrigation block, if any, of not to exceed ten years

from and including the first calendar year in which water is delivered for the lands in said block; and that during the development period water shall be delivered to the lands in the irrigation block involved at a charge per annum per acre-foot, or other charge, to be fixed by the Secretary each year and to be paid in advance of delivery of water: *Provided,* That where the lands included in an irrigation block are for the most part lands owned by the United States, the Secretary, prior to execution of a repayment contract, may fix a development period, but in such case execution of such a contract shall be a condition precedent to delivery of water after the close of the development period. After the close of the development period, any such charges collected and which the Secretary determines to be in excess of the cost of the operation and maintenance during the development period shall be credited to the construction cost of the project in the manner determined by the Secretary.

(2) That the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation of the organization; and that the organization may vary its distribution of construction charges in a manner that takes into account the productivity of the various classes of lands and the benefits accruing to the lands by reason of the construction: *Provided,* That no distribution of construction charges over the lands included in the organization shall in any manner be deemed to relieve the organization or any party or any land therein of the organization's general obligation to the United States.

(3) That the general repayment obligation of the organization shall be spread in annual installments, of the

number and amounts fixed by the Secretary, over a period not exceeding forty years, exclusive of any development period fixed under subsection (d) (1) of this section, for any project contract unit, or for any irrigation block, if the project contract unit be divided into two or more irrigation blocks.

(4) That the first annual installment for any project contract unit, or for any irrigation block, as the case may be, shall accrue, on the date fixed by the Secretary, in the year after the last year of the development period or, if there be no development period, in the calendar year after the Secretary announces that the construction contemplated in the repayment contract is substantially completed or is advanced to a point where delivery of water can be made to substantially all of the lands in said unit or block to be irrigated; and if there be no development period fixed, that prior to and including the year in which the Secretary makes said announcement water shall be delivered only on the toll charge basis hereinbefore provided for development period.

(5) Either (A) that each year the installment of the organization's repayment obligation scheduled for such year shall be the construction charges due and payable by the organization for such year; or (B) that each year the installment for such year of the organization's repayment obligation shall be increased or decreased on the basis of the normal and percentages plan provided in section 4 of this Act for modification of existing obligations to pay construction charges, and the amount of the annual installment of the organization's obligation, as thus increased or decreased, shall be the construction charges due and pay-

able for such year. Under (B) of this subsection the provisions of section 4 of this Act shall be applicable, as near as may be, to the repayment contract made in connection with the new project, new division of a project or supplemental works on a project; and the organization shall make payments on the basis therein provided until its general repayment obligation has become due and payable to the United States in full.

Sec. 9(e) (53 Stat. 1196, 43 U.S.C. sec. 485h(e):

In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to said subsection (d).

Appendix I

ACT OF JULY 2, 1956
(70 Stat. 483, 43 U. S. C. A. sec. 485h-1 (1956 Supp.)).

Sec. 1:

In administering section 9, subsections (d) and (e) of the Reclamation Project Act of 1939 (53 Stat. 1187, 1195), the Secretary of the Interior shall—

(1) include in any long-term contract hereafter entered into under said subsection (e) provision, if the other contracting party so requests, for renewal thereof under stated terms and conditions mutually agreeable to the parties. Such terms and conditions shall provide for an increase or decrease in the charges set forth in the contract to reflect, among other things, increases or decreases in construction, operation, and maintenance costs and improvement or deterioration in the party's repayment capacity. Any right of renewal shall be exercised within such reasonable time prior to the expiration of the contract as the parties shall have agreed upon and set forth therein;

(2) include in any long-term contract hereafter entered into under said subsection (e) with a contracting organization provision, if the organization so requests, for conversion of said contract, under stated terms and conditions mutually agreeable to the parties, to a contract under subsection (d) at such time as, account being taken of the amount credited to return by the organization as hereinafter provided, the remaining amount of construction cost which is properly assignable for ultimate return by it can

probably be repaid to the United States within the term of a contract under said subsection (d);

(3) credit each year to every party which has entered into or which shall enter into a long-term contract pursuant to said subsection (e) so much of the amount paid by said party on or before the due date as is in excess of the share of the operation and maintenance costs of the project which the Secretary finds is properly chargeable to that party. Credit for payments heretofore made under any such contract shall be established by the Secretary as soon after the enactment of this Act as it is feasible for him to do so. After the sum of such credits is equal to the amount which would have been for repayment by the party if a repayment contract under subsection (d) had been entered into, which amount shall be established by the Secretary upon completion of the project concerned or as far in advance thereof as is feasible, no construction component shall be included in any charges made for the furnishing of water to the contracting party and any charges theretofore fixed by contract or otherwise shall be reduced accordingly;

(4) provide that the other party to any contract entered into pursuant to said subsection (d) or to any long-term contract entered into pursuant to said subsection (e) shall, during the term of the contract and of any renewal thereof and subject to fulfillment of all obligations thereunder, have a first right (to which right the rights of the holders of any other type of irrigation water contract shall be subordinate) to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within the boundaries of, or owned by, the

party and a permanent right to such share or quantity upon completion of payment of the amount assigned for ultimate return by the party subject to payment of an appropriate share of such costs, if any, as may thereafter be incurred by the United States in its operation and maintenance of the project works; and

(5) provide for payment of rates under any contract entered into pursuant to said subsection (e) in advance of delivery of water on an annual or semiannual basis as specified in the contract.

(6) include a reasonable construction component in the rates set out in any long-term contract hereafter entered into under said subsection (e) prior to amortization of that part of the cost of constructing the project which is assigned to be repaid by the contracting party.

Sec. 2:

The Secretary is hereby authorized to negotiate amendments to existing contracts entered into pursuant to section 9, subsection (e), of the Reclamation Project Act of 1939 to conform said contracts to the provisions of this Act.

Sec. 3:

As used in this Act, the term "long-term contract" shall mean any contract the term of which is more than ten years.

Sec. 4:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws

of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

Sec. 5:

This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

Appendix J

CALIFORNIA IRRIGATION DISTRICT FEDERAL COOPERATION LAW (California Water Code, Division 11, Part 6, Chapter 2).

Sec. 23175:

This chapter shall be known and may be cited as the Irrigation District Federal Cooperation Law.

Sec. 23176:

[Application of provisions.] The provisions of this chapter apply only to proceedings taken under it and do not apply to district operations unrelated to cooperation with the United States.

[Other provisions of division unaffected.] Except as required expressly or by necessary implication by this chapter all other provisions of this division are unaffected by this chapter.

Sec. 23177:

The definitions in Chapter 2 of Part 1 of this division are applicable to this chapter.

Sec. 23178:

The provisions of Article 4 of Chapter 2 of Part 5 of this division do not apply in case of any contract between a district and the United States.

Sec. 23179:

The board shall perform all acts necessary to carry out the enlarged powers enumerated in this chapter.

Sec. 23195:

Districts may cooperate and contract with the United States under the Federal Reclamation Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto or any other act of Congress heretofore or hereafter enacted permitting cooperation.

Sec. 23196:

The cooperation and contract may be for any or all of the following purposes:

(a) Acquisition, extension, or operation of works for irrigation or drainage or development and distribution of electric power or any or all of these purposes.

(b) A water supply.

(c) Assumption as principal or guarantor of indebtedness to the United States on account of district land.

(d) Borrowing or procuring money from the United States to finance any of the operations of the district.

(e) Financing or refinancing obligations of the district, including outstanding warrants or other indebtedness.

(f) Purchasing or refunding bonds of the district.

(g) Accomplishing any of the purposes of the district.

Sec. 23197:

In a contract made pursuant to Section 23196 a district may include provision for either or both of the following:

(a) Delivery and distribution of water for the land in the district under the relevant acts of Congress and the rules and regulations established thereunder.

(b) Conveyance to the United States as partial consideration for the privileges obtained by the district under the contract of any property of the district.

Sec. 23200:

All water, the right to the use of which is acquired by a district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract, and provision may be made in the contract for the refusal of water service to any or all land which may become delinquent in the payment of any assessment levied for the purpose of carrying out the contract.

Sec. 23225:

A district may submit any contract or proposed contract and bond issue to the superior court of the county in which is situated the office of the board to determine the validity thereof, the authority of the district to make the contract, and the authority for and validity of the issuance and deposit or transfer of the bonds. The validation proceedings shall be had as in the ordinary case of the judicial determination of the validity of district bonds and with like effect.

Appendix K

SANTA BARBARA COUNTY WATER AGENCY ACT

(Calif. Stats. 1945, ch. 1501, p. 2780, as amended by Calif. Stats. 1949, ch. 12, p. 24, 1 Deering's Calif. Water Code Ann., Act 7303 (1954)).

Sec. 6:

The agency shall have the power to cooperate and contract with the United States under the Federal Reclamation Act of June 17, 1902 and all acts amendatory thereof or supplementary thereto or any other act of Congress heretofore or hereafter enacted permitting cooperation or contract for the purposes of construction of works, whether for irrigation, drainage, or flood control, or for the acquisition, purchase, extension, operation or maintenance of such works, or for a water supply for any purposes, or for the assumption as principal or guarantor of indebtedness to the United States, or for carrying out any of the purposes of the agency, and to carry out and perform the terms of any contract so made; and for said purposes the agency shall have in addition to the powers specifically set forth in this act, all powers, rights and privileges possessed by irrigation districts as set out in Chapter 2 of Part 6 of Division 11 of the Water Code, not inconsistent with the provisions of this act.

Sec. 6.3:

The agency shall have the power to cooperate; act in conjunction and contract with the United States, State of

California, municipalities, and public districts of any kind, in the purchase and sale of water, in the acquisition of water or a water supply, in the construction of any works for the controlling of flood or storm waters in the agency, or for the protection of property, watersheds, watercourses, highways and life, or for the purposes of conserving and transporting said waters for beneficial use, and for the use, operation, management and ownership of such works. The agency also may make and perform any agreement with the United States, the State, any county, municipality, district of any kind, public corporation, any person or any number of them for the joint acquisition, disposition, or operation of any property or works or water or water supply of a kind which might be acquired, disposed of, or operated by the agency.

Any county water district, water conservation district, municipality, flood control district, and any other district or political subdivision of the State empowered by law to appropriate water and deliver water to users shall have the power: (a) To cooperate, act in conjunction and enter into contracts with the agency for all the purposes for which the agency is empowered to cooperate, act in conjunction and contract with such districts, municipalities, and political subdivisions; (b) and to carry out the terms of such contracts.

Sec. 11.10:

The agency may bring at any time after the authorization of bonds or the levy of any special assessment or after the execution of any contract an action in the

Superior Court of the State of California in and for the County of Santa Barbara to determine the validity of the bonds or of the levy or of the contract. The action is in rem. Jurisdiction of all parties interested may be had by publication of summons for at least once a week for three weeks in a newspaper of general circulation published in the agency and designated by the court in which the proceedings are pending. Jurisdiction is complete 10 days after the completion of the publication of summons. Before the expiration of the 30 days after jurisdiction is acquired any person interested may appear and contest the validity of the bonds or assessment or the contract. If no proceedings have been brought by the agency pursuant to this section, any agency assessment [sic] or taxpayer may at any time within 30 days after the levy of any assessment or authorization of any bonds or execution of such contract bring an action in the said superior court to determine the validity of the assessment or bonds or contract. The agency shall be a defendant. If more than one action is pending at the same time concerning similar contests provided for in this section, they shall be consolidated and tried together. The rules of pleading and practice not inconsistent with the provisions of this section are applicable to all actions or proceedings provided for by this section. In a contest provided for by this section, the court shall disregard any irregularity or omission which does not affect the substantial rights of the parties. The judgment shall declare the bonds or levy or contract either valid or invalid. The costs of any hearing or contest may be allowed and apportioned between the parties or taxed

to the losing party in the discretion of the court. Any party may appeal at any time within 30 days after the entry of the judgment. No contest of any thing or matter herein provided shall be made other than in the time and manner in this section provided. In any such action all findings of fact or conclusions of the board upon all matters shall be conclusive unless the action was instituted within six months after the finding or conclusion was made.

Appendix L

CALIFORNIA WATER CODE SECTION 22250.

All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes.

Appendix M

CALIFORNIA WATER CODE, DIVISION 11, PART 5, CHAPTER 4.

Article 2. Validation of Bonds and Assessments

22670. A district may at any time after the authorization of any bonds or the levy of any assessment bring an action in the superior court of the office county to determine the validity of the bonds or of the levy.

22671. The action is in rem.

22672. Jurisdiction of all parties interested may be had by publication of summons for at least once a week for three weeks in a newspaper of general circulation published in the county where the action is pending and designated by the court in which the proceedings are pending.

22673. Jurisdiction is complete 10 days after the completion of publication of summons.

22674. Anyone interested may before the expiration of the 10 days appear and contest the validity of the bonds or assessments.

22675. If no proceedings have been brought by the district pursuant to this article, any district assessment payer may at any time within 30 days after the levy of any assessment or authorization of any bonds bring an action in the superior court of the office county to determine the validity of the assessment or bonds. The district shall be a defendant.

22676. If more than one action is pending at the same time concerning similar contests provided for in this article, they shall be consolidated and tried together.

22677. The rules of pleading and practice in the Code of Civil Procedure not inconsistent with the provisions of this article are applicable to all actions or proceedings provided for by this article.

22678. In a contest provided for by this article the court shall disregard any irregularity or omission which does not affect the substantial rights of the parties.

22679. The action shall be speedily tried.

22680. The judgment shall declare the bonds or levy either valid or invalid.

22681. When a district has exchanged bonds or has agreed to exchange bonds for any interest in property the court in any proceeding brought by a district pursuant to this article shall by its decree determine both:

(a) The validity of all bonds issued or to be issued under any contract or contracts for the exchange of bonds for property interests.

(b) Whether or not the bonds when delivered to the person entitled to them under the terms of the contract will or do constitute valid obligations of the district as against all persons.

22682. The motion for a new trial of any action or proceeding provided by this article shall be heard and determined within 10 days from the filing of the notice of intention.

22683. The costs of any hearing or contest provided for in this article may be allowed and apportioned between the parties or taxed to the losing party in the discretion of the court.

22684. Any party may appeal at any time within 30 days after the rendition of the judgment. The appeal shall be heard and determined within three months from the taking of the appeal.